H

HEARINGS
See Remedies of Taxpayers.

HIRING
See Leases of Tangible Personal Property—In General.

HOMES
See Hospitals, Institutions and Homes for the Care of Persons.

HORSES
See Animal Life and Feed. Sale of shares in horse syndicate agreements, see Tangible and Intangible Property.

300.0000 HOSPITALS, INSTITUTIONS AND HOMES FOR THE CARE OF PERSONS—Regulation 1503

Medical gases, exemption certificates for, see also Prescription Medicines.

300.0006 **Billing Methods.** When a hospital sends a bill to a patient and to the patient's insurer, it is the bill sent to the patient that is relevant in determining whether the hospital is the retailer or the consumer under Regulation 1503. 5/28/93. (Am. 2003–3).

(Note: Changes to Regulation 1503, effective June 1, 2001, replaced the ''administered vs. nonadministered'' concept with the new procedures specified in subdivision (b)(2).)

300.0006.875 **Central Supply Items.** There are specific circumstances where a particular item can be self consumed when used in a certain manner by hospital employees or doctors and sold at retail at other times. Examples are: diapers used in nurseries by nurses may be self consumed whereas diapers provided to parents upon discharge of a newborn would be sold at retail. Other examples are sanitary pads, sanitary belts, adult diapers, and infant diapers. 4/30/92.

300.0007.200 **Central Supply Items—Self-Consumed.** The following items are consumed by doctors or nurses during surgery or other procedures to maintain a sterile bacteria and germ free operating environment although most of the items appear to be disposable. Title, possession, and control of these items never passes to a patient.

Q-Tips (not sent home with the patients)

¾ sheet (surgical drape)

Scrub brush used by surgical nurse to prepare incision site

Sponge Kerlix (sterile dressing)

Isolation masks

Disposable hair clip (used by nurse or doctor to remove hair from patients wound during procedure)

Fluffs (sterile dressing)

HOSPITALS, INSTITUTIONS, ETC. (Contd.)

Exam glove worn by doctor or nurse when performing procedures and/or treating a patient.

Surgeons glove (used during surgery or for other tactile contact)

Pad elbow/pr (placed under patient's elbows and heels during surgery)

Sponge prep (used by nurse to wash patient prior to surgery or other procedure.

Blanket

Towel disp

Drape zimmer

Sheet disp

Scalpel disp

Bk table cover

Mayo cover

Goion disp

Sleeve disp

Cover X-ray

Cover scope

Cover vidrape

Lap sponges

Raytec sponges

Neuro sponges

Arm drape

Basin disp or sheet disp

Bottle disp

Sheet extremity

Ioban drape

Laser drape

Micro laser drape

Drape hip

Morgan lens (a contact-style lens with a tube attached used by a doctor or nurse for irrigating the eye)

Blankets

Disposable needles

Bedpan fracture (used with a patient with severely limited activity and also serves as a container for output measure)

Urine collector (used to obtain sample for measurement, chemical testing, or fluid retention monitoring)

Chux which are plastic-lined pads placed on hospital beds, etc., as a form of disposable bedding and placed under various parts of a patient's body to gather fluids and catch debris. Use requires professional or technical

services or nurses to examine and weigh them to determine the amounts of body fluids discharged for purposes of treatment and diagnoses.

Alternate birthing pads (placed on birthing bed to keep birth area relatively clean to catch body waste and fluids for observation and measurement.)

Bedpans and urinals

Thermometers and thermometers covers (covers are plastic sheathes which cover the sensors of computerized, reusable thermometers.)

Peri-bottles. 4/30/92.

300.0008 **Child Care and Housing Facility.** A food service company was engaged to provide meals at a state child care and housing facility where children, faculty and staff receive meals free of charge.

Assuming the state child care and housing facility qualifies as an ''institution'' under Regulation 1503(a), the sales of meals and food products which are furnished to the children, faculty, and staff who reside at the facility are exempt from tax. Under Regulation 1603(m), the exemption for meals applies only to meals furnished to residents of the institution. Staff who reside in the facility as part of their jobs qualify as ''residents.''

On the other hand, the food service company is the retailer of meals which it serves and the facility is the consumer of the meals, food and drinks which are furnished free of charge to non-resident children, faculty and staff. Accordingly, the food service company must report and pay tax on the sales of such meals to the facility. 1/24/92.

300.0010 **Condominiums and Homeowner Associations.** A condominium or homeowner's association which serves meals in a common dining area is not considered to supply ''room and board'' as required in Regulation 1503 so as to qualify as a house or institution supplying room and board for a flat monthly rate and serving as a principal residence exclusively for persons 62 years of age or older. 11/21/79.

300.0035 **Empty I/V Container, Enema Bags and Syringes.** Hospitals purchase empty intravenous solution containers and empty enema bags. In both cases, a pharmacist or nurse prepares or compounds the contents which are exempt medicines. The customer is customarily charged for the intravenous solution or enema preparation.

Sales or use tax applies to the hospital's purchases of empty intravenous solution containers and enema bags because there is no sale of the containers with the medicine to the patient. Such containers are part of a hospital's medicine handling system and never leave the hospital's possession until they are thrown out by the hospital. As such, the hospital is the consumer of such containers and tax will apply to the sales to the hospitals. This same analysis also would apply to syringes. 3/2/82.

300.0040 **Food Service Contractor.** Section 6363.6 of the Revenue and Taxation Code, exempts the sale or use of meals served to residents or patients of an institution as defined in the section, regardless of whether a food service

contractor serves the meals or sells them to an institution which serves them. No tax applies as to the sale to or use by the institution or to the sale to or use by the residents or patients if the meals are served to the residents or patients. 9/26/68.

300.0050 **Gaseous Oxygen Storage Tanks.** A hospital has two storage tanks for gaseous oxygen that are part of a storage unit set in place, with a back-up storage unit for emergencies. The gas storage tanks are referred to as ''vessels'' to distinguish them from the portable gas ''cylinders''. The hospital questions its supplier collecting tax measured by the rental payments.

The application of tax to leases of vessels is different than the application of tax to leases of cylinders. Large items such as vessels are considered to be fixtures. In this case, the supplier is leasing fixtures and has elected to pay use tax measured by the rental payment. Thus, the supplier (lessor) must collect tax at the time the hospital makes the rental payments. This opinion applies only to the taxation of the leases of the vessels. It does not apply to charges for the gaseous oxygen itself. 4/8/91; 5/3/91.

300.0054 **Hospital Charges to Patients.** Charges to patients for items of tangible personal property which either are not ''administered'' or for which a separate administration charge is made constitute retail sales. This is the case whether the payments made are based on the specific amount of service or quantity of property provided or a ''flat rate'' based on a pre-approved schedule of services (e.g., a per capita rate, a per diem rate, etc.).

In instances where the hospital provides administration of property and no separate charge is made, the hospital is the consumer.

If the hospital maintains a tax paid inventory, a tax-paid purchases resold deduction is allowable in cases where the hospital makes a separate charge for nonadministered items or makes a separate charge for administration of administered items.

In those instances where billings to insurance companies are subject to a ''contract allowance'' whereby it is understood that the amount paid will be less than the amount billed, the unpaid amount is a discount to be taken at the time of the transaction, not a bad debt to be taken later. 5/23/88. (Am. 2003–3).

(Note: Changes to Regulation 1503, effective June 1, 2001, replaced the ''administered vs. nonadministered'' concept with the new procedures specified in subdivision (b)(2).)

300.0055 **Hospitals.** When a hospital makes a charge for property administered to a patient and no separate identifiable charge for administration is made, the charge for the property is deemed to include the administration and the hospital is the consumer of the property. Hospitals whose billing policy is to furnish patients with nonitemized summary billings of nonadministered items are the consumers of such items, even though the patient may request and receive a separately itemized billing of such charges. Conversely, if the policy is to provide itemized billings for such property, the hospital is the retailer of the items furnished even if a summary billing is also furnished. The type of bill received by an insurer is of no consequence unless the insured patient receives no bill from

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the hospital, in which case the same distinction made for patient billings applies to the insurer's billings. 5/1/86. (Am. 2003–3).

(Note: Changes to Regulation 1503, effective June 1, 2001, replaced the ''administered vs. nonadministered'' concept with the new procedures specified in subdivision (b)(2).)

300.0065 **Meals Furnished Employees Residing at House or Institutions.** For purposes of section 6363.6(c), a house or institution will be considered a principal residence exclusively for persons 62 years of age or older even though some employees who are under the age of 62 years of age are also provided rooms and meals. In such circumstances, the residents, as opposed to employees, are still exclusively over 62 years of age and therefore the requirements of section 6363.6(c) will be considered to have been met. Tax will apply to the sale or consumption of meals served to the employees. 8/12/81.

300.0070 **Menus.** Menus purchased for use in a hospital's dietary department do not qualify for exemption under Regulation 1503 as a nonreusable item which ''become components of meals or food products . . . furnished or served to residents or patients.'' 1/29/75.

300.0080 **Out-Patient and Day Care Patients.** The exemption provided by Section 6363.6 applies with respect to meals served by hospitals to bona fide out-patients and day care patients while they are in the hospital. 10/18/68.

300.0120 **Reports.** The taxability of a hospital's charges to insurance companies for a summary of the medical care and treatment of a patient depends upon whether the hospital personnel use their technical or professional skills in the preparation of such reports, such as making decisions on what should go on such reports, on evaluating the reports, or otherwise exercising judgment in the preparation of the reports. If so, the charges are not taxable. But if the operation amounts to merely copying or duplicating the desired reports, the transaction would be taxable as a sale of tangible personal property. 2/21/64.

300.0124 **Retirement Home.** Some but not all of the residents of a retirement home which qualifies as an institution under Regulation 1503(a)(3) are required to eat their meals at the home. The cost of the meals is included in the monthly fee. Meals are optional for other residents. The meals provided to those who pay a single monthly fee for room and board are exempt from tax. 8/25/94.

(Note: Section 1503(a)(3) is section 1503(a)(4) as the result of amendments adopted June 20, 1995.)

300.0130 **Sale of Supply Items to the U.S. Government (Medicare).** Hospitals furnish tangible personal property to their patients in connection with medical care. There are several factors relevant to determining whether the hospital is the consumer of the property so furnished or the retailer. (See Annotation 300.0134 for a discussion of these factors.) One of the relevant factors is whether the hospital separately itemizes its charges for the tangible personal property on its bill for hospital care. It is the bill the hospital sends to the

patient that is determinative, regardless of whether the patient pays the bill directly or the patient's insurer pays the bill: statements that the hospital may issue to the insurer are not relevant.

When a hospital issues an itemized billing to the patient, the hospital may be regarded as the retailer of certain tangible personal property as discussed in annotation 300.0134. However, if the hospital does not provide the patient (whether a direct pay patient or one whose insurer will pay the hospital's bill) with billing showing itemized charges for nonadministered tangible personal property, the hospital is the consumer of such property.

Medicare now requires hospitals to use a specific format when submitting bills to be paid by Medicare, and that format does not involve sending an itemized billing to either Medicare or the patient. However, the Medicare regulations do not forbid the hospital from sending the patient a completely itemized statement, and thus do not prevent the hospital from being regarded as the retailer of nonadministered tangible personal property if that is what it wishes. If so, the hospital must send to the patient an itemized billing with separate charges for such property. 11/25/91.

300.0134 **Supplies—Sold or Consumed.** Hospitals are primarily service providers who consume tangible personal property used in rendering their services. However, hospitals may also be regarded as selling certain tangible personal property where the hospital makes a separate charge for the property and title or possession of the property passes to the patient. (Regulation 1503(b)(2).)

If a hospital makes a lump-sum charge for its services, it is regarded as the consumer of all property consumed in rendering those services, even if some of the property is transferred to the patient incidental to the hospital's services. The hospital is also always the consumer with respect to property for which title does not pass to the patient, such as reusable items and disposable gloves, regardless of the manner of billing. Thus, even if a hospital makes a separate charge for a dozen disposable gloves worn by hospital personnel during an operation, the hospital is not regarded as selling the gloves to the patient but instead is the consumer of them.

The manner of billing is relevant, however, with respect to property title to which passes to the patient. When a hospital makes a separate charge for such an item, the hospital is regarded as selling that item to the patient. If the item is not ''administered'' within the meaning of subdivision (b)(2) of Regulation 1503, and the hospital itemizes a charge for that item, the hospital is regarded as the seller of it. Nonadministered items, title to which passes to the patient include tissues, guest trays, pills (sales of which may be exempt as medicines), and items the patient takes upon release from the hospital.

When title to an item is transferred to the patient and the item is administered within the meaning of Regulation 1503(b)(2), the question is whether an itemized charge referring to the item is a separate charge for the item. If an item is administered, the hospital is not regarded as making a separate charge for the item unless it bills an amount for the item itself and then makes a separate charge that is specifically for the administration of that item. If instead the hospital bills

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an amount for the item without an additional separately itemized charge for administration of that item, the hospital is not regarded as the seller thereof even if title passes to the patient upon administration. 12/27/95. (Am. 2003–3).

(Note: Changes to Regulation 1503, effective June 1, 2001, replaced the ''administered vs. nonadministered'' concept with the new procedures specified in subdivision (b)(2).)

300.0140 **Weight Reducing Facility.** Persons providing meals and lodging as part of a supervised weight reduction program are not operating a ''hospital'' or ''other institution.'' Such persons are retailers of meals served to individuals undertaking the program. 1/2/69.

HOTELS

See Taxable Sales of Food Products.

I

ICE
See Packers, Loaders, and Shippers; Property Used in Manufacturing.

IMPORTS
See Interstate and Foreign Commerce.

IMPROVEMENTS TO REAL PROPERTY
See Buildings and Other Property Affixed to Realty; Construction Contractors; United States Contractors.

INCOMPETENT PERSONS
See Hospitals, Institutions and Homes for the Care of Persons.

INDEBTEDNESS
Assumption and cancellation as gross receipts, see Gross Receipts.

305.0000 INDIANS

305.0006.500 **Chapa De Indian Health Program.** Pursuant to Public Law 93–638 Chapa De Indian Health Program is an executive agency of the United States when carrying out the purpose of a contract with the Indian Health Service in connection with Public Law 93–638. As a result, sales of medical equipment to Chapa De are exempt from tax under section 6381(a). 2/5/96.

305.0007 **Construction Contractors.** A construction contractor other than U.S. government contractor may be considered a retailer rather than a consumer of materials if he meets the provisions of Regulation 1521(b)(2)(A)(2). This section provides, in part, that a contractor is a retailer if the contract explicitly provides for the transfer of title to the materials prior to installation and the contract separately stated the sales price of the materials exclusive of the charge for installation. If the contractor meets these provisions and the contract is for improvements to realty on an Indian reservation, the contractor may purchase the materials for resale and incur no sales tax liability as a result of selling them to an Indian(s) on the reservation, even though the material is attached to the realty by the contractor. 3/31/89.

305.0008 **Construction Contract on Indian Reservation.** Where provisions of a construction contract between a non-Indian contractor and an Indian Housing Authority provide that title to materials transfers prior to the time they are installed by the contractor or subcontractor and the sales price of materials is separately stated, the contractor is the retailer of the materials and may purchase the materials for resale. The contractor's sales of materials to the Indian Housing Authority on the reservation are exempt from tax.

If the contract does not have both the provision for title passage and the separate statement of the sales price of materials, the contractor is the consumer of the materials pursuant to Regulation 1521. 1/4/88. (Am. 2000–1).

INDIANS (Contd.)

305.0009 **Material Sales—No Sovereign Immunity for Non-Indian Contractor.** An Indian tribe enters into a contract with a non-Indian construction contractor to perform a construction contract on the tribe's reservation. In order to avoid the otherwise applicable sales or use tax on the purchase of the materials, the contract purportedly appoints the construction contractor to act as the tribe's agent for purposes of purchasing materials that will be incorporated into the tribe's real property. The construction contractor thereupon arranges for the acquisition of the materials from vendors who deliver the property to the reservation, with title passing to the contractor on the reservation.

The relationship between the tribe and the construction contractor is that of non-agent independent contractor. Therefore, the construction company is not an agent of the tribe. Even if the tribe's appointment of the construction contractor as its agent were effective, the tribe cannot exercise its sovereign immunity from sales and use tax liability through an agent. (See *U.S.* v. *New Mexico* (1982) 455 U.S. 720, 736.) Accordingly, the vendor's sale of materials to a non-Indian contractor on an Indian reservation is subject to tax. 3/27/02.

305.0013 **Half-Indian Couple.** A married couple is not a ''person'' under the Revenue and Taxation Code. As a result, where property is sold and delivered to a husband and wife on a reservation, but only one of the purchasing spouses is an Indian, one-half interest in the property is exempt from tax. The half interest in the property attributable to the non-Indian is, however, subject to tax.

This interpretation is applied only to sales to a husband and wife when both spouses are involved in the transaction. For example, if only the Indian spouse appears on the sales document and all other conditions for exemption are met, the sale will be considered fully nontaxable. If only the non-Indian spouse appears on the sales documents, the sale will be considered fully taxable. 4/30/81.

305.0015 **Holders of Indian Trader's License.** Persons who hold Indian trader's licenses and make only nontaxable sales on the reservation, do not require a seller's permit. However, a seller's permit is required if the trader makes sales to purchasers who live off the reservation or to non-Indians who live on the reservation. The trader is required to collect use tax from the purchasers under these circumstances. (Regulation 1616 (d)(3)(A)(2)). 8/30/89.

305.0016 **Houses on Indian Reservation.** A firm contracts with an Indian Housing Authority to construct 40 homes on an Indian Reservation. The contract provides in part: ''Title to all materials to be used in this project which are delivered to and properly stored on the jobsite and the subject of partial payment shall transfer to the owner prior to the time the materials are installed by the contractor or any subcontractor.'' The contract also provides for a separate price for materials and charges for installation.

The contractor is the retailer of the materials and the sales to the Housing Authority on the reservation are exempt from tax. 1/16/86.

305.0019 **Independent Contractor v. Agency Relationship.** A Non-Indian Corporation (NIC) has contracted with an unincorporated Indian organization

INDIANS (Contd.)

(Tribe) to manage an Indian-owned business enterprise of the Tribe on an Indian Reservation. NIC and the Tribe are planning a major expansion of the business enterprise on reservation land. The expansion facilities will include permanent buildings, improvements to existing structures, and related fixtures and equipment. The expansion facilities will be wholly owned by the Tribe upon purchase and installation, without liens or other encumbrances.

According to the agreement between NIC and the Tribe, NIC has the authority to act as an agent for the Tribe when making purchases of any and all materials and equipment. The agreement further states that NIC may also hold itself out as an agent of the Tribe in order to exercise its rights, duties, and obligations under the agreement.

Under the agreement, NIC would have to fund any proposed expansion, and reimbursements would be limited to funds payable from operating profits within 90 days of completion. NIC does not intend to enforce its right to reimbursement since NIC expect to recapture its capital investment over time through receipts of its management fee, which is a fixed percentage of operating income. The expansion is expected to result in an increase in operating income translating into an increase in NIC's management fee.

Based upon these facts, as to the proposed work of improvements, the relationship between the Tribe and NIC is not an agency relationship for sales and use tax purposes. Instead, NIC's relationship to the Tribe in that context is that of an ''independent contractor.'' In undertaking to construct the proposed expansion, NIC is not planning on making the necessary purchase on credit of the Tribe, or even with funds provided by the Tribe. Instead, NIC has agreed to perform certain specified services in return for a percentage of the profit from the Tribe business. Thus, NIC is the contractor of the Tribe, not an agent of the Tribe, and in constructing the work of improvement, NIC is merely carrying out its contractual obligations to the Tribe so as to earn the promised consideration. 3/21/96.

305.0020 **Indian Contractor.** A partnership comprised of enrolled Indians enters into a contract to install water and service systems on an Indian reservation. The pipe for the job is purchased out of state and shipped directly to the reservation and installed.

Under these circumstances, the applicable tax, if any, is the use tax. California use tax does not apply where the purchaser is an enrolled Indian and the purchase takes place on an Indian reservation. 7/15/75.

305.0023 **Indian License Tax.** In accordance with Regulation 1616(d)(3)(A)2, on-reservation Indian retailers are required to collect use tax on sales to non-Indians and Indians who do not reside on a reservation. The collection of use tax is not precluded by the existence of an ordinance imposing an Indian license tax. 3/21/91.

305.0023.400 **Indian Organization.** To verify whether an organization is an Indian organization organized under tribal authority as stated in Regulation 1616, an examination of the articles of incorporation is necessary. 8/5/97. (M98–3).

INDIANS (Contd.)

305.0024 **Indian Purchaser Does Not Reside on Reservation.** Sales of property by an off-reservation retailer negotiated off a reservation but with the sale occurring to an Indian on a reservation is exempt from tax if the Indian resides on a reservation, unless the purchaser uses the property off the reservation more than one-half of the first 12 months after the purchase. Therefore, sales of property by an off-reservation retailer negotiated off a reservation, but with the sale to an Indian occurring on a reservation, is subject to use tax if the Indian purchaser does not reside on a reservation. 10/21/96.

305.0024.250 **Indian Reservations—Agua Caliente Reservation.** The Agua Caliente Reservation was established by Executive Order. At the time of the order, portions of the area were in private ownership and thus not part of the reservation. This is contrasted to areas involving treaties in which land in a reservation was later acquired in fee title by both Indian and non-Indian residents due to ''allotment'' acts authorized by Congress and other means. In this latter case, privately owned lands are considered ''Indian Country.'' Thus, for purposes of Regulation 1616, sales within these areas are sales within the reservation. In the case of the Agua Caliente Reservation, the properties privately owned at the time of the Executive Order within the outer boundaries of the reservation are not ''Indian Country.'' Any sales in such areas are not within the reservation for the purposes of Regulation 1616.

Any retailer claiming that his location is within ''Indian Country'' must establish that the land in question is either reservation land (i.e., included in the land reserved for the tribe), or held in trust by the U.S. for the benefit of an Indian or a tribe, or part of ''Dependent Indian Communities,'' which consist of lands validly set apart for the use of Indians as such under the superintendence of the United States. 8/26/96.

305.0024.350 **Indian Residing on Reservation Other than Reservation of Purchase.** Sales to Indians who live on reservations other than the reservation of purchase and who are not members of the selling Indian's tribe qualify for the exemption provided in Regulation 1616. All that is required is for the purchasing Indian to reside on a reservation and for the purchased property to be used on reservation property more than 50 percent of the time within the first year that the property is purchased. 8/19/97. (M98–3).

305.0025 **Indian Tribal Sales Tax.** A non-Indian makes retail sales of tangible personal property to non-Indians on an Indian reservation. The Indian reservation imposes a sales tax on these sales. The Indian tribal tax that is added to the sales price is regarded as part of gross receipts and is subject to tax. No credit for the Indian tribal tax is allowable under section 6406 of the Revenue and Taxation Code. 2/4/94. (Am. 2003–3).

(Note: For periods on or after January 1, 2003, Revenue and Taxation Code sections 6011(c)(12) and 6012(c)(12) exclude from the definition of ''sales price'' and ''gross receipts'' the amount of tax imposed by an Indian tribe within the State of California measured by a stated percentage of the sales or purchase

price of tangible personal property sold at retail. This exclusion only applies to those retailers who are in substantial compliance with the Sales and Use Tax Law.)

305.0027 **Traders.** Tax application with respect to sales on an Indian reservation is as follows:

(1) Only those persons federally licensed as Indian Traders are regarded as Indian traders, regardless of whether they are in fact selling to Indians.

(2) An Indian licensed as an Indian trader does not need a seller's permit but a non-Indian licensed as an Indian trader does need a seller's permit.

(3) The sale by an Indian seller to a non-Indian does not create a use tax exemption for the non-Indian.

(4) An enrolled member of another tribe is entitled to the exemption to the same extent as the tribe member on whose reservation the sale is made. 12/3/75.

305.0028 **Non-Indian Contractors Building on Reservation Land.** An Indian tribe hired a non-Indian construction contractor to construct improvements to realty on the Indian reservation. Sales tax applies to sales on construction materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the material to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations. 3/31/95.

305.0028.025 **Non-Indian Construction Contractor May Qualify as Retailer of Materials to Indians.** When a construction contractor contracts to sell and to install materials, the construction contractor may resell the materials as a retail sale prior to making any use of them (e.g., installing them) only by complying with the provisions of Regulation 1521(b)(2)(A)2.; that is, only if (1) its construction contract separately states the price of materials, exclusive of the charge for installation (e.g., a time and materials contract as described in Regulation 1521(a)(7)); (2) the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and (3) in fact, the contractual provisions are carried out.

Where a non-Indian construction contractor resells materials to an Indian, for construction on a reservation, under a construction contract that complies with Regulation 1521(b)(2)(A)2., the construction contractor must also (1) comply with the requirements of Regulation 1616(d)(4)(A), which include delivery made to an Indian on the reservation, and in fact passing title to the materials to the Indian on the reservation, and (2) must do so prior to the use of the materials in order for the retail sale of the materials to be exempt from tax. In order to fulfill the requirements that title and possession of the materials actually pass to the Indian purchaser on the reservation, the contract, invoices, and bills of lading must stipulate that the materials are to be shipped F.O.B. the reservation (unless the materials are delivered by the contractor/retailer's own facilities). Without this clause on all documents, title would actually pass to the Indian purchaser upon delivery of the materials to the carrier for shipment despite the contract providing that title passes on the reservation, and the contractor's sale of materials to the Indian would be subject to tax.

In addition to meeting the requirements described above, the contractor selling materials to an Indian should obtain from the Indian an exemption certificate as described in Regulation 1667 to substantiate that the contractor's sale was exempt from sales and use tax. The contractor must also make available a copy of this exemption certificate to any vendor that is also a subcontractor, when that subcontractor vendor accepts a resale certificate from the contractor.

While a construction contractor generally cannot avoid liability for tax on its use of materials furnished and installed by him or her by taking a resale certificate from the prime contractor, a subcontractor who sells materials to the prime contractor pursuant to Regulation 1521(b)(2)(A)2. may accept a resale certificate *only* if (1) the prime contractor will, in turn, sell the materials in compliance with Regulation 1521(b)(2)(A)2.; *and* (2) the prime contractor's sale of materials is an exempt sale to an Indian fulfilling the requirements of Regulation 1616(d)(4)(A), which include delivery made to the Indian purchaser on the reservation and title (ownership) transferring to the Indian purchaser on the reservation. 06/12/02. (2003–2).

305.0028.500 **Pre-paid Taxes by Indian Retailer to Distributors of Fuel.** Distributors of gasoline and diesel are liable to collect a portion of the sales tax attributable to the retail sale of gasoline and diesel sold to an Indian retailer. These pre-paid taxes are imposed on distributors who pass these costs, as well as other costs of doing business, to the Indian retailer. If the pre-paid taxes attributable to fuel purchased by qualified Indians are included in the sale prices, the Indian retailer may file a claim for refund with the Board for the pre-paid taxes. Refunds of pre-paid taxes must be returned to each qualified Indian who made such purchases. If the pre-paid taxes attributable to fuel purchased by qualified Indians are deducted from the price of the fuel at the time of the sale, the Indian retailer may still file a claim for refund and keep the refund. 8/19/97. (M98–3).

305.0028.750 **Resident Requirement for Indian Contractor.** Regulation 1616 does not require that an Indian contractor performing work on an Indian reservation be a member of the tribe which resides on the reservation or reside on the reservation upon which the contract is performed. As long as the Indian contractor, regardless of the tribe of affiliation or state of qualification as an Indian contractor, arranges to have materials delivered, pursuant to a construction contract with an Indian reservation located in California, sales tax will not apply. 8/5/97. (M98–3).

305.0028.900 **Sale of Gaming Machines to Indian Organization.** A California taxpayer has a contract with an Indian organization with gaming machines and pedestals. The contract provides that the items purchased are to be delivered "F.O.B. destination to the reservation and that upon delivery and installation of the goods to the Indian organization, title and risk of loss damage or seizure shall pass" to the Indian organization. The contract is silent as to whether delivery is made by facilities of the taxpayer or by common carrier.

Since the contract provides F.O.B. place of destination, the retailer completes its performance with reference to the physical delivery of the property on tender

to the purchaser there. Therefore, even though delivery is made by common carrier (such as U.P.S.), the title or ownership of the property is transferred on the reservation. Thus, the requirements for the exemption under Regulation 1616(d)(4) are met and the sale is not subject to sales tax. 6/24/97.

305.0029 **Sales of Housing Units.** Corporation A, a manufacturer of mobilehomes and factory-built housing, sold 38 mobilehomes to Corporation B for a residential project on an Indian reservation in June of 1987. The units were to be used as housing for an Indian Housing Authority (Housing Authority). Corporation B is not a licensed mobilehome dealer. An agreement dated May 26, 1987 between Corporations A and B, the Housing Authority, and a Mortgage Corporation indicated that Corporation B contracted with the Housing Authority to complete several residential developments. The evidence supports a finding that once Corporation B had contracted with the Housing Authority to build the residential units and secured its financing, Corporation B contracted with Corporation A to manufacture the mobilehomes. Corporation A believed that the sale was to the Housing Authority and that Corporation B was merely an agent for the Housing Authority. Thus, the sale was an exempt sale to an Indian organization. In support of this belief, Corporation A submitted a letter dated April 11, 1988, from a development officer for the Housing Authority stating that Corporation B was its agent and also an exemption certificate from the Executive Director of the Housing Authority dated July 1, 1988 stating that the Housing Authority purchased the units from Corporation A through its agent, Corporation B. Alternatively, Corporation A also believed that the units were factory-built housing and that if taxable at all, the units should be taxed at 40% of the sales price to the consumer.

There is no evidence of an agency relationship between Corporation B and the Housing Authority other than the statements made by representatives of the Housing Authority a full year after the sales took place which is not timely and must be considered as self-serving evidence. The language in the agreement of May 26, 1987 clearly indicates that Corporation B had contracts with the Housing Authority to complete a residential neighborhood. It is concluded that B was not an agent of the Housing Authority but merely a developer. There is no evidence that Corporation A's customer was the Housing Authority. Rather Corporation A's invoices clearly stated that Corporation B was the customer and that the terms were ''fob factory.''

The statutory term ''factory-built housing'' does not include mobilehomes. There was no evidence that the units had the approval of the Department of Housing and Community Development (Department) or the local building authority. There were no insignias of approval or other evidence that the units were approved by the Department or local building authority.

Additionally, Corporation A had charged tax on 75% of the sales price of other units sold to Corporation B which were for use outside the reservation. While this is not conclusive evidence that the units in question were mobilehomes, it is evidence that Corporation B was buying mobilehomes for its project. The total evidence indicates the units were mobilehomes. 10/19/90.

INDIANS (Contd.)

305.0032 **Sales by Indians to Indians.** A California retailer operating outside a reservation sells property to an Indian retailer operating on the reservation. The Indian retailer resells the property to a reservation Indian who picks up the property at the place of business of the California retailer off the reservation. In this situation, the sale by the Indian retailer is not made on the reservation and the Indian retailer is liable for the sales tax. The California retailer cannot be held liable under section 6007 since the Indian retailer is engaged in business in this state. Section 6007 applies only where the retailer is not engaged in business in this state. 4/5/77.

305.0033 **Sales of Newspapers on Reservation.** Sales of newspapers on a reservation are exempt from sales tax when delivery is to an Indian. Sales on a reservation to a non-Indian are subject to sales tax. 12/20/91.

305.0035 **Sales to Non-Indians on Reservation.** Indian retailers selling tangible personal property on their reservations to non-Indians are required to register with the Board and collect and remit use tax on such sales. 7/8/76.

305.0060 **Traders on Reservations.** As a result of the decision of the United States Supreme Court in *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), sales tax does not apply to sales by federally licensed Indian traders trading with Indians on reservations. After noting that Congress and the Commissioner of Indian Affairs have prescribed comprehensive statutes and regulations governing Indian traders, the court says:

"We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the state with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the state the privilege of levying this tax. Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, these state laws imposing taxes cannot stand." 1/17/67.

305.0100 **Tribal Tax.** A tribal tax is similar to a business license tax imposed by a municipality. These taxes are considered one of the costs of doing business and may not be deducted from gross receipts. 6/13/96.

305.0300 **Use Tax Collection Responsibility.** When an Indian tribe sells tangible personal property on the reservation to non-Indians or to Indians who do not reside on the reservation, the tribe is required to register with the Board and to collect use tax from the purchasers. This is true even if the tribe manufactures the property on the reservation. 11/15/94.

INDIANS (Contd.)

305.0360 **Use Tax—Exemption.** Regulation 1616 sets forth the conditions under which the use of property, including vehicles, vessels, and aircraft, purchased by an Indian from an off reservation retailer and delivered to the purchaser on the reservation is exempt from use tax. The test for ''use'' is a ''principal use'' test covering the first 12 months following delivery. Thus, if a vehicle is used on the reservation more than it is used off the reservation during that first 12-month period, the principal use is considered to be on the reservation. When not in functional use, the vehicle would be ''garaged'' (stored or used) on the reservation. 6/2/89.

310.0000 INFORMATION RETURNS—Regulation 1687

310.0200 **Required to File Information Returns.** A distributor of foreign vehicles, who is not a dealer (licensed with DMV) and not engaged in business in California, may be required to file information returns with the Board. The returns are to include information the distributor has on California consumers who have purchased vehicles from dealers. 4/11/89.

315.0000 INSTALLING, REPAIRING, RECONDITIONING IN GENERAL—Regulation 1546

See Fur Repairers, Alterers, and Remodelers; Miscellaneous Repair Operations; Vehicle Engine Exchanges. Maintenance contracts, see Returns, Defects and Replacements. Producing, fabricating, processing distinguished, see also Producing, Fabricating and Processing Property Furnished by Consumers—General Rules.

(a) IN GENERAL

315.0010 **Applying Teflon Coating to New and Used Equipment.** Taxpayer is in the business of applying Teflon coating at its place of business in California to new and used equipment furnished by its customers. Taxpayer is performing fabrication when it applies the Teflon to new equipment, and tax applies to the taxpayer's total charge unless the sale is otherwise exempt.

Taxpayer is repairing or reconditioning property when it applies Teflon to the used equipment of its customers. Thus, taxpayer is the consumer of the Teflon it furnishes in such operations if the retail value of the Teflon (and any other materials furnished) is 10 percent or less of taxpayer's lump-sum charge. If such is the case, tax applies to the sale to or use by taxpayer of the Teflon (and other materials). If, however, the taxpayer separately states its charges for the Teflon (and any other materials) regardless of its retail value or if its value exceeds 10 percent of the taxpayer's total charge, the taxpayer is the retailer of the Teflon and other materials it furnishes. If such is the case, tax applies to taxpayer's separately stated charge (or if not separately stated, the fair retail value) for such property unless the sale is exempt from tax. 6/26/97.

315.0030 **Body Shop Repair Supplies.** A body shop and repair operator has charged its customers a flat fee for supplies ''rated'' to the job. Usually such fees relate more to the operator's own formula than to the actual value of the supplies

used. The operator uses this approach in an attempt to avoid paying the sales tax to the sellers of the supplies. The supplies are items such as sandpaper, paint thinner, etc.

If a purchaser who has a valid seller's permit insists on its purchasing for resale property of a kind not normally resold in its business and makes such a statement on the resale certificate, the retailer would have no alternative but to accept the resale certificate as taken in good faith and the seller would then be exempt from the imposition of sales tax. The purchaser who gave the certificate would be liable for the use tax if in fact it used the items rather than resold them.

Items purchased and used by the body shops such as masking tape, thinner and the like are not regarded by the Board as items sold by the repairer and, accordingly, the repair shop should not charge tax to its customers. As a consumer of such materials, the body shop is guilty of a misdemeanor under the Sales and Use Tax Law when "tax" or "tax reimbursement" is charged to the customers. Such charges will be regarded as excess tax reimbursement and will have to be refunded to the customers or they will be retained by the Board.

In addition, the purchaser (body shop) will still be liable for use tax measured by the purchase price of those items purchased from the supplier under a resale certificate and used on the job. In such cases, the shop operator would be responsible for the payment of the use tax directly to the Board without any offset for the amount of tax reimbursement that was collected from the customers.

Also, if a particular individual continues to collect excess tax reimbursement, the Board has the authority to revoke his seller's permit. 5/26/77.

(Note: Subsequent statutory change re excess tax reimbursement.)

315.0055 **Computer Additions.** A computer company receives a computer, which was bought elsewhere, from a customer. The company produces and installs into the computer an amplifier.

If the computer is a new computer, sales tax applies to the entire charge for the installation of the amplifier.

If the computer is a used computer, and the amplifier simply amplified the audio output of the computer and does not refit the computer for a use different from which it was originally produced, the charge for the amplifier and parts furnished to the customer is taxable. Tax does not apply to the charge for labor to install the amplifier. 4/13/92.

315.0060 **Consumer of Replacement Merchandise, Repairer as.** The purchase of new merchandise by a repairer to replace merchandise of customers lost through fire on repairer's premises is a retail taxable sale to the repairer. If such merchandise is purchased ex-tax under a resale certificate it must be reported as consumed goods for no resale takes place under such circumstances. 7/27/53.

315.0070 **Crushing of Broken Concrete Rubble.** The crushing of broken concrete rubble to be used as a base for road and building construction is not a repair or reconditioning operation. Rather it results in a processed product having

different characteristics, shape, form and qualities from the rubble it was crushed from. As such, the charges for crushing represent taxable processing under Section 6006(b), when performed for a consumer. 1/21/77.

315.0090 **Engineering and Reassembly Charges.** An out-of-state manufacturer of ovens used for drying and smoking food products sold and installed an oven for a customer in California. Included in the contract price were separately stated charges for ''engineering,'' which was for the labor of designing the oven to the customer's specifications, and for ''oven labor'', which was for reassembly labor and installation.

The oven is considered to be a fixture. The manufacturer was the retailer of the oven and also a construction contractor. Since there was no local participation in the transaction by any office, salesperson or representative of the manufacturer, the applicable tax due is the use tax, which the manufacturer is required to collect from the purchaser. The charge for engineering (design labor) is a ''service that is part of the sale'' and is includable in the measure of tax. The oven labor (reassembly labor) is not subject to tax if title passed prior to the reassembly and the customer was not required to hire the seller to do the reassembly. In this case, while title may have passed prior to reassembly, there was no evidence to show that the customer could have hired another person to do the reassembly. Accordingly, the charge for reassembly is includable in the measure of tax. 9/27/91.

315.0100 **Engineering Services.** Charge for supervision of installation and initial operation of equipment by a competent engineer is excludible from taxable gross receipts.

Charges for drawings, plans, diagrams, etc., relating solely to the general layout arrangement and integration of various items of machinery would be considered as charges for installation of the property and likewise excludible from gross receipts. That portion of such charges, however, which relate to design or production of the equipment would be subject to tax. 3/27/53.

315.0108 **"Fair Retail Selling Price."** A company proposes that it segregate repair parts and materials from labor on each billing by ascertaining an average cost of materials used in each repair category (i.e., minor, general, major, or maximum repairs). It plans to use available statistics and compute an average as a constant or weighted percentage of the total charge which would be representative of the cost of parts for each type of repair. The balance of the charge would constitute labor and thus not be subject to the sales tax.

It appears reasonable to conclude that the charges to be made by the company, using its minor, general, major, and maximum classifications, may within each category reasonably approximate the fair retail selling price of parts and materials. It is clear that tax reimbursement may not be charged to the customer based upon the total repair price and that any charge for parts and materials cannot be based upon an average of parts and materials used in all classifications of repair. It is reasonable, however, to accept the practice that has been proposed

as being in compliance with the regulation if in effect the ‘‘fair retail selling price’’ of the parts and materials used in any particular repair transaction is reasonably ascertained.

The exception to the acceptance of this procedure would occur where no parts or materials are utilized in a repair. The company would not be permitted to collect tax or tax reimbursement from its customers based upon the ‘‘fair retail selling price’’ of parts where in fact no parts were sold. 6/4/76.

315.0120 **Hydraulic Lift Gate.** The charge for installing a hydraulic lift gate on a leased truck is not subject to sales tax because it is owned by the lessee and does not constitute a sale or further construction of the truck. 10/20/64.

315.0121 **Installation.** Installation includes unpacking, lubricating, adding fluids, and testing of the property. 12/29/86.

315.0122 **Installation of Boards in a Computer.** A purchaser contracts to have utility boards installed in a computer. If the computer is new, the installation of the utility boards is a step in providing the final product. The entire charge is taxable regardless of whether the boards are installed by the seller of the computer, the seller of the boards, or someone else hired by the purchasers. 6/20/94.

315.0123 **Installation Cost—Cabinets.** Installation charges in connection with a contract to furnish and install cabinets are excluded from the measure of tax even though they are not separately stated in the bid, contract, or invoice. (Section 6012 (c)(3)). 1/23/92.

315.0124 **Installation of Motherboard/Added Memory—Used Computer.** A taxpayer is in the business of changing the motherboard of, or adding memory to, a customer’s used computer. Assuming the motherboard or additional memory merely upgrades the used computer by increasing its existing memory and does not refit the computer for a use different from which it was originally produced, the charge for the labor to install these items is not subject to sales tax. The charge for the motherboard or additional memory furnished to the customer is taxable. 1/21/97.

315.0125 **Installation of Satellite Television Systems.** A retailer of satellite television systems provide installation as an option. The installation includes putting a post in concrete, putting five pieces of the satellite disk on the post, putting electronics on the disk, running wire from the disk to the inside of the house, hooking up electronics to the wire, aligning the disk, and programming the receiver.

This is a construction contract. Charges for labor or services used in installing or applying the property sold are excluded from the measure of tax. 1/4/93.

315.0140 **“Lift Gates” on Used Trucks.** A ‘‘lift gate’’ is an accessory rather than an integral part of a truck. Separately stated charges for installation labor would not be included in the measure of tax where the installation is made on a used truck. 4/15/57.

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315.0142 **"Lift Gates" on New Trucks.** A vehicle is traditionally regarded as ''new'' when 1) the vehicle qualifies as a new vehicle when it is registered with DMV and 2) the contract for fabrication operations on the vehicle is entered into within 60 days of the registration date.

The labor to install an accessory, such as a lift gate, in a new vehicle, is a step in the manufacturing process resulting in the creation or production of a vehicle produced as specified by the consumer. Installation of accessories on a new vehicle is subject to tax as fabrication labor. 11/28/01.

315.0150 **Low Emission Motor Vehicles and Retrofit Devices.** Pursuant to Section 6356.5(a), Revenue and Taxation Code incremental costs of the sale of and storage, use, or other consumption in this state of new low emission motor vehicles certified by the Air Resources Board are exempt from tax provided the incremental cost is separately stated on the manufacturer's label affixed to the vehicle, the manufacturer's invoice to the retailer, and the retailer's contract of sale with the purchaser. Incremental cost is the difference between the actual price of a new low emission vehicle and the manufacturer's suggested retail price for a comparably equipped conventional fuel vehicle.

Pursuant to Section 6356.5(b), Revenue and Taxation Code, the sale of, and the storage, use or other consumption in this state of any retrofit device is exempt from tax provided low emission labeling appears on the device itself or its packaging, the documentation from the manufacturer to be retained by the retailer upon sale, and the retailer's contract of sale with the purchaser.

A retrofit device is exempt when sold as a kit or when installed on a customer's vehicle. The labor to install will generally qualify as exempt installation or repair labor. If the dealer purchases a vehicle, installs the retrofit device and sells the vehicle with the device, the vehicle does not qualify as a new low emission vehicle, nor is it a sale of a retrofit device, and the entire selling price of the used vehicle is a taxable transaction not exempt pursuant to Section 6356.5(a) or (b). 11/13/92.

315.0158 **Mandatory vs. Optional Maintenance Contract.** If a seller/lessor is willing to sell or lease equipment without also requiring the purchase of a maintenance contract, a maintenance contract purchased in connection with the purchase of that equipment will be regarded as an ''optional maintenance agreement.'' The fact that the customer's ''request for proposal'' required the bid to include a maintenance contract will not alter the optional status of the contract. Therefore, as long as the charge for the maintenance contract is separately stated, and the purchaser/lessee could have purchased or leased the property, without also purchasing the maintenance contract, the sales price of the maintenance contract is not subject to tax. 10/30/86.

315.0160 **Mounting Gun Scope.** Mounting a scope on a new gun constitutes fabrication and the charges therefore are taxable. Mounting a scope on a customer's used gun constitutes installation labor and the charges therefore are exempt. 7/23/68.

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315.0180 **Lease in Lieu of a Sale.** A home furnishing store sells merchandise on a lease contract basis, the lease being in lieu of a sale, and taxable as a sale of the property covered by the lease. Installation charges, such as connecting a stove, a washing machine, laying carpets, etc., in the contract, are excludible from taxable gross receipts. 12/4/53.

315.0200 **Lessor Using Repair Parts.** Sales tax does not apply to repair parts used by lessor in maintenance of equipment in possession of lessee under a rental agreement and upon which lessor is paying sales tax measured by rental receipts. Such repair parts may be regarded as part of the equipment in rental service. 6/9/54.

315.0205 **Mandatory Maintenance Contracts.** When a lessor leases property in substantially the same form as acquired and makes a timely election to pay sales tax reimbursement or use tax measured by the purchase price then the lease including any mandatory maintenance contracts is not regarded as a sale under the Sales and Use Tax Law. If the lessor purchases parts to use in repairing the leased property, the lessor is also the consumer of those parts since they are being incorporated into property which the lessor is not reselling. 3/5/92.

315.0206 **Travel or Mileage Fees.** Separately stated travel or mileage fees in connection with a repair of tangible personal property are not includable in the measure of tax if the vendor does not furnish any tangible personal property or if the tangible personal property furnished by the repairer is as a ‘‘consumer’’ pursuant to Regulation 1546(b).

If the repairer also furnishes parts for which it is the retailer under Regulation 1546, the issue of whether part or all of the charge is includable in the measure of tax depends on whether the charge is related to the parts, labor, or both. If the charge is related solely to parts, it is includable in the measure; if related solely to labor, it is excluded; if it is related to both, it should be prorated in the respective ratio of the charges for parts and labor.

When a contract which provides for a ‘‘mileage and truck charge’’ for having trucks stocked with all necessary tools and common material to complete a service call without making a trip to a supply shop, saving additional labor charges, and for small supplies, the charge is an overhead charge related to both labor and parts and should be prorated. Part of such a charge is for stocking parts on the truck.

On the other hand, when a firm which makes a ‘‘service charge’’ in connection with dispatching a truck to repair, changes or replaces a tire as needed, the charge is not related to the sale of tangible personal property when circumstances dictate that a tire be replaced and such a charge is not added when the customer brings in a vehicle for a tire replacement. 9/17/82; 1/27/95.

315.0207 **Maintenance Contracts.** A retailer of computers and software sells maintenance contracts with the following features:

(1) Software updates provided on diskette, including the right to use, i.e., the right to copy software updates into the customer’s computer.

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(2) Media and manuals on how to install/apply software updates.

(3) Hardware parts replacement, on site support, telephone support and hotline.

The customer has the option of purchasing these feature(s) in the following combinations. Feature 1 (by itself), feature 1 and 2 or feature 1, 2 and 3, or feature 1 and 3 (without feature). If the customer purchases feature 1 it may be used only on one computer. A separate purchase is required to use the software on any other computer. On the other hand only one purchase of feature 2 is required regardless of how many computers are involved. For example, the customer may purchase 100 units of feature 1 and only one unit of feature 2.

If a person enters into a contract which includes features 1, 2 and 3, the charges for features 1 and 2 are subject to tax. Since feature 3 is optional with the customer, a separately stated charge for this feature is not subject to tax. Rather, the use of parts by the repairer fulfilling the contract would be taxable.

The fact that feature 3 cannot be purchased without purchasing feature 1 or feature 1 and 2 does not change its optional nature. The customer may purchase the tangible personal property (features 1 and 2) without purchasing feature 3. 4/18/91.

315.0207.150 **Miscellaneous Materials—Body Repair Shop.** A body and paint shop may purchase for resale items such as lubricants, adhesives, and nuts and bolts which are physically transferred to the customer. On the other hand, items such as shop rags, paper products, abrasives, cleaners, masking tape, and paper are not transferred to the customer and title to them would not pass to the customer in the absence of an appropriate title passage clause. In the absence of such a clause, these items may not be purchased for resale. When a taxpayer makes a miscellaneous material charge for both classes of items based on an hourly charge, the taxpayer may only obtain sales tax reimbursement on the portion related to the items resold, e.g., lubricants, nuts and bolts, and adhesive. 2/21/97.

315.0208 **Optional Maintenance Contracts.** The repairer is the consumer of tangible personal property used in the performance of optional maintenance contracts on property owned by the U.S. government, even if the contract contains a title clause declaring that title passes to the owner of the item being repaired upon installation to that item, and even if the repairer makes no use of the property other than installation to the item being repaired. 8/22/90.

315.0209 **Optional Repair Warranties.** A manufacturer of service station equipment sells optional warranty policies to purchasers of its equipment. It contracts with an independent repair facility to make repairs under the warranties. The manufacturer manufactures all repair parts. The repair facility purchases repair parts for inventory from the manufacturer. The value of repair parts and materials used on repair jobs exceeds 10 percent of total charge.

In some cases, the repairer takes items from its own stock to make repairs. Upon completion of the repairs, the manufacturer replaces the parts without charge to the repairer. In other cases, the manufacturer provides parts directly so

that the repairer does not have to remove parts from its inventory. In still other cases, the repairer purchases parts from a distributor. The distributor gives full credit for the purchased parts when defective parts are returned.

Since the warranty policies are optional, the manufacturer is the consumer of the repair parts and materials. When the repairer furnishes parts which it purchases in a repair operation, there is a retail sale to the manufacturer even though the manufacturer replaces the parts or the distributor accepts defective parts as payment. The definition of ''sale'' includes barter. Tax applies to the retail selling price of the parts. If the manufacturer provides parts directly (the repairer is installing parts owned by the manufacturer), tax applies to the raw material cost of the parts. 2/18/94.

315.0210 **Optional Warranties.** Optional warranties may be provided by other than the seller of the property. A repairer who enters into a warranty contract which is not required as part of the sale of tangible personal property is providing an optional maintenance contract under Regulations 1546(b)(3) and 1655(c)(3) whether or not that person was also the seller of the property for which the warranty is issued. That person is the consumer of materials and parts furnished in performing the repairs and tax applies to the sale of such property to the repairer or to the use by the repairer of that property. 8/23/90.

315.0211 **Optional Warranties.** A seller of equipment also sold optional lump-sum maintenance agreements to its customers. This seller then subcontracted the actual maintenance work, also for a lump-sum amount. Irrespective of whether the optional maintenance agreement was purchased from the seller of the equipment or from some other party, the subcontractor actually doing the repair work is the consumer of the parts used because that subcontractor was performing repairs under the optional maintenance agreement it sold. 10/21/88.

315.0215 **Out-of-State Repairs.** Charges for repairs made on an item of tangible personal property at a service center outside California and then shipped to the customer's location inside California by common carrier or U.S. Postal Service would not be considered a sale in this state subject to sales tax.

If the repairman is the retailer of parts used to perform the repair work, use tax would apply to the customer's purchase of repair parts. The repairman is the retailer of the parts if the retail value of the parts is more than 10% of the total charge or if a separate charge is made for the repair parts. Otherwise, the repairman is the consumer of the property. In that case, the customer will not be liable for use tax on the purchase of the repair parts since the out-of-state repairman is the consumer of the items.

In a second situation, repairs are made on an item of tangible personal property at a service center located in California and then shipped to the customer's location outside California by common carrier or U.S. Postal Service.

If the repairman is the consumer of the parts as described above, tax applies to the repairman's purchase of the repair parts from his vendors. If the repairman is the retailer of the parts, either because the value of the parts exceed 10% of the

total charge or because the repairman makes a separate charge for the repair parts, the repairman would not be liable for the sales tax if the repairman is required by the contract of sale to ship the parts out of state and does, in fact, ship the parts out of state. 10/31/88.

315.0221 **Painting Repair Parts.** A charge made by a repair person to paint a new part used in the repair operation is not subject to tax. The charge is considered ''for repainting or refinishing used articles'' under Regulation 1551. This is true whether the new part is painted before or after installation. 8/30/99. (2000–1).

315.0240 **Pipe Coating—Well Stop Charges.** A chemical formulation is injected into oil wells for the purpose of coating the metal surfaces of pumps, tubing, and sucker rods to protect against corrosion, scale and bacterial attack. The chemical is forced under pressure from a tank truck into the well, where the well pump distributes it. The performance of the injection services requires skilled technicians, and may or may not be performed by the supplier who furnishes the chemicals. The injection services are not required as a condition of the sale by the retailer of the chemicals and in all cases the well operator controls the quantity and formulation of the chemicals applied. Under these circumstances, the injection services represent nontaxable installation labor. The charges for the chemicals are subject to tax. 11/25/70.

315.0260 **Pole Lines.** The charge for the stringing of wires on existing utility lines and other installations such as making connections, installing apparatus and guy wires, etc., are nontaxable installation charges. The tax applies only to the extent of the selling price of the materials furnished by the contractor. 6/18/57.

315.0283 **Providing Workers.** A company provides only workers to an independent business without furnishing the place of work, any supervision of the worker or any materials, tools, equipment or supplies used in performing the work. The payment for the work is based merely on an hourly rate for the labor. The workers furnished will be considered ''special employees'' of the business to whom they are furnished and the furnisher will not be considered as producing, fabricating, or processing consumer furnished tangible personal property under Regulation 1526. It is immaterial that the workers may bring with them some of the tools required to perform a specific job. 6/6/75.

315.0285 **Purchase of Drums.** A client of a container service company purchases a quantity of drums to guarantee availability of the drums when needed during a season. The client takes title and possession of the drums and requests the company to store the drums until needed. The company charges a storage fee. Later, the client takes some drums and requests the company to recondition some of the other drums, for which the company charges a reconditioning fee.

Assuming the company sells the drums prior to storage (i.e., contract provides that title passes, payment is made, and tax reported at that time), the charge for storage after the sale is not part of the taxable gross receipts from the sale as long as that storage is not mandatory. If the drums are used drums and the

reconditioning is for the purpose of restoring the drums to their original condition, the application of tax is as provided by Regulation 1546. If the reconditioning prepares the drums for a new and different purpose, the reconditioning is fabrication and the entire charge for the reconditioning is subject to sales tax. If the drums are new, the reconditioning is fabrication, by definition, and the entire charge is subject to sales tax. 7/7/92.

315.0287 **Reassembly Charges.** A taxpayer sells and installs pumps. Customers may contract to purchase the pumps with or without installation. The taxpayer purchases pumps from an out-of-state manufacturer. The manufacturer assembles the pumps at the factory for testing and disassembles them for shipment. The taxpayer reassembles and installs the pumps at the customers' sites if the customer desires. The customers issue separate purchase orders for the pumps and for reassembly and installation. The taxpayer issues separate invoices. The negotiations for sale and for reassembly and installation are conducted separately and by different personnel.

Since the reassembly and installation are separately negotiated, ordered and invoiced, the charges are not charges related to the sale of tangible personal property. Reassembly constitutes reconditioning rather than fabrication regardless of whether it is performed by the manufacturer or a different person. Accordingly, tax does not apply to the charges for reassembly or installation. 4/22/88.

315.0289 **Reconfiguration of a Wall System.** Reconfiguration of an existing wall system, which is not attached to realty, is considered to be a nontaxable repair. If a reconfiguration involves a substantial change from the original wall system due to the addition of many new components, that reconfiguration would be taxable fabrication. 12/24/86.

315.0290 **Re-covering Lithographic Printing Rollers.** A company requested information regarding the sales or use tax application to re-covering lithographic printing rollers. The repair process is described as follows:

(1) The roller is picked up at the company's place of business.

(2) The old rubber cover is removed from the steel core.

(3) If bearings are present, they are removed. The core is sandblasted and cleaned. If the journals need to be repaired, the roller core is sent to an outside machine shop for repair.

(4) The core is prepared to accept the rubber compound, which is applied in the proper thickness.

(5) The core and rubber covering are put into a furnace and cured for the appropriate time.

(6) The roller is machined or ground to specification.

(7) The roller is wrapped and prepared for return.

It is assumed that the new roller cover is custom made and is fabricated at the time the roller is refurbished rather than one which is merely pulled from existing

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stock. It is also assumed that most of the charge for the repair of the journals is labor, that few new parts are put in, and that the journals are mostly inspected and cleaned.

The reference to a ''rubber compound'' and the need to use the compound indicates that the refurbishers fabricate a new cover from raw stock. Consequently, steps 4 and 5 are steps that result in the creation or production of tangible personal property, and the labor charges are considered taxable fabrication labor. In step 3, the removal and presumably, the replacement of the bearings would be considered repair and installation labor. The repair of the metal journals appears to be a process that takes place, if necessary, whether or not a custom or ready-made cover is used. From the statement that the greater amount of the repair bill for the journals or roller end is labor, it appears that the charges for the job are repair labor. The sandblasting and cleaning of the core would be considered non-taxable repair labor if a ready-made cover were used but a step in the production of tangible personal property if a custom cover is used. The charges for removal and replacement of the bearings (step 3) and steps 1, 2, 6 and 7 are nontaxable repair and installation labor. Based on the facts supplied, the refurbishment of the roller ends or journals appears to be nontaxable repair labor. 9/5/90; 2/5/91. (Am. 2001–3).

315.0292 **Remanufacture of Mobile Concrete Mixer Drums.** Steps in remanufacturing of mobile concrete mixer drums are as follows:

(1) Remove old drum from truck.

(2) Buy the steel.

(3)(a) Remove concrete build-up.

(b) Skip cut drum—cutting slots in old shell so it can be removed later.

(4) Lay out, cut and form steel to fit drum.

(5) Tack weld the new steel over old shell.

(6) Remove the old shell from the inside.

(7) Weld inside and outside weld seams.

(8) Install new internal parts.

(9) Leak check, clean and prime.

(10) Install on truck.

Based on the above described process, the nontaxable repair and installation labor consists of removing the old drum (item 1), removing the concrete (item 3a), and installing the new drum (item 10). The charges for all the other work listed are subject to sales tax as part of the charge for fabricating the new drum. 8/25/87.

315.0296 **Repair Work on Property Used on a Contract with the U.S.** Repair or maintenance work on property owned by a contractor and used in the performance of a contract with the U.S. is subject to tax in the same manner as such work would be if performed for any other purchaser. 10/28/82.

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315.0297 **Repairs Under Warranty.** A taxpayer provides a warranty to its customers as part of its sale of equipment. When the equipment is returned for repair under warranty, the taxpayer contracts with a subsidiary or with independent service centers for the repair. In some cases, the taxpayer provides parts from its resale inventory to the subsidiary or to the independent service center to accomplish the repair. The warranty work is generally performed at the site of the user of the equipment.

When the taxpayer furnishes the parts, the charge by the subsidiary or service center for labor is not taxable. If the warranty is optional, the taxpayer is liable for tax on the cost of parts removed from its resale inventory unless the parts are installed outside California. If the warranty is mandatory, the parts are regarded as having been sold with the original sale of the equipment.

When the taxpayer does not furnish parts, the subsidiary or the service center is regarded as selling the parts to the taxpayer if the parts are separately invoiced to the taxpayer or if the retail value of parts and materials exceeds 10% of the total charge. Otherwise, the subsidiary or the service center is the consumer of the parts. If the taxpayer is regarded as purchasing the parts, tax will not apply to parts installed outside California or to parts provided under mandatory maintenance contracts. 11/10/94.

315.0298 **Screenprint onto Used T-Shirt.** Screenprinting onto a customer's T-shirt which has been worn previously is regarded as repairing the T-shirt. If a separate charge is made for materials incorporated onto the T-shirt, the taxpayer is regarded as the retailer of those materials and sales tax applies to those material charges. If a separate charge is not made for materials but the retail value of those materials is more than 10 percent of the total charge made, then the taxpayer is also regarded as the retailer of materials. The remainder of the charges for repairs would not be subject to sales tax.

When the taxpayer performs repairs and is not regarded as a retailer (i.e., value of materials is less than 10 percent and the charge is billed lump sum) as discussed above, the taxpayer is the consumer of all materials furnished in connection with repairs. Sales or use tax applies to the taxpayer's purchase of such materials. 9/17/91.

315.0299 **Shelving, Installation of.** Charges for installation labor are not taxable, whether or not they are separately stated. Labor for providing shelving is regarded as taxable assembly labor rather than installation labor, unless part of the shelving is attached to the real property and the remaining components of the shelving are sequentially attached to the part already attached to create the shelving. 8/14/79.

315.0300 **Shoe Braces.** Leg braces are attached to a pair of new shoes. The braces constitute a separate finished product and the labor of attaching them to the shoes is exempt installation labor rather than taxable fabrication labor. 9/2/55.

315.0305 **Silicon Wafers—Repair or Fabrication.** Silicon wafers originally purchased as ''test wafers'' are sent to a manufacturer for reprocessing. If the

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wafers have been used to test other wafers or other property or used in research and if the reprocessing restores them to their original condition, the charge is for repair labor which is not taxable.

If the term ‘‘test wafers’’ means that the wafers were tested by the customer and determined to be inadequate or substandard because they did not meet specifications, such wafers are new, not used. In such case, the reprocessing constitutes taxable fabrication labor for property furnished by a consumer. 3/24/93.

315.0308 **Spare Parts—Optional Maintenance Contracts.** A taxpayer purchased spare parts ex-tax from out-of-state vendors or from California vendors under a resale certificate. The parts were stored in the taxpayer’s California facility pending need. The parts in question were subsequently used in performing repairs on optional maintenance contracts on leased equipment located out of state and were transferred to an out-of-state facility for storage or use there. The taxpayer claimed depreciation deduction on the parts held for use in performing maintenance contracts on its income tax return.

Property purchased in California under a resale certificate or from out-of-state vendors and subsequently shipped to a point outside the state without any use other than that outlined in section 6009.1 is not subject to use tax.

With respect to the taxpayer’s income tax depreciation deductions on this property, there is no income tax rule which precludes a taxpayer from claiming depreciation deductions on such property merely because the holding of the property is excluded from ‘‘use’’ for sales and use tax purposes. Thus, the claiming of depreciation deductions does not preclude the taxpayer from obtaining the benefits of section 6009.1.

However, when the taxpayer is aware, at the time of purchase, that it will be a consumer of parts purchased for use on its optional maintenance contracts, it should not issue a resale certificate for this type of property. If it does issue resale certificates, it will be liable for tax under section 6094.5. 2/29/88.

315.0310 **State Inspection and Emission Stickers.** State and emission inspections are regarded as a sale of labor and, therefore, charges for these inspections are not taxable. The state and emission inspection certificates (stickers) are regarded as a record of the inspection and not as tangible personal property. As such, sales tax does not apply. If any repairs are performed as a part of the inspection, sales tax applies to the repair charges in accordance with Regulation 1546. 2/6/95.

315.0320 **Subcontracting Repairs.** Sales tax does not apply to the full charge for repair services even though the retailer subcontracts the repairs. The tax will apply only to the charge for materials and parts furnished in connection with the repair. The retailer, in turn, can give the repairman who actually performs the repair service a resale certificate to cover the sale of the repair parts by the repairman to him. 3/30/51.

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315.0325 **Subcontractors.** A subcontractor performs repair work for a retailer. The provisions of Regulation 1546(b)(2) would apply to the subcontractor. That is, if the parts and material the subcontractor furnishes in connection with the repair work will be ten percent or less of the total charge to the retailer and if the subcontractor does not separately state the charge for those parts and material, the subcontractor is the consumer of the parts and material and tax applies to the sale to him/her. 1/30/90.

315.0328 **Third Party Service Repair Contracts.** A taxpayer located in California performs third party service/repair calls for customers. The taxpayer is hired by customers who are located out of state and have no employees in California. Taxpayer is hired to perform repairs on products which are covered by some type of maintenance agreements issued by its customers.

If the taxpayer's customers contract for the repairs because they are obligated pursuant to optional maintenance agreements, the customers are the consumers of the parts the taxpayer sells. Therefore, the taxpayer's sales of parts to them are retail sales and sales tax applies to such charges for those parts. If the taxpayer's customers are obligated pursuant to mandatory maintenance agreements, the customers are the retailers of the parts they purchase. Thus, taxpayer's sales of the parts to them are nontaxable sales for resale.

When the repair service is performed on office equipment owned by the federal government, the application of the tax is the same as explained above. Although sales of tangible personal property directly to the United States are exempt from sales tax, this exemption does not apply here since the taxpayer will not be making the sales to the United States. Rather, taxpayer's sales of the parts are to the out-of-state customer under either an optional or mandatory maintenance agreement. (Regulations 1546(b)(3)(A) and 1655(c)(1).) 1/28/94.

315.0330 **Tinting Windows.** Tinting windows on used vehicles, vessels, and aircraft is considered a repair operation. If no separate charge is made for the tinting material itself, and the fair retail value of the material is 10 percent or less of the total charge, the repairman is the consumer of the material. As such, no tax applies to the charge for the tinting. The repairman should pay the sales tax to its suppliers when purchasing the tinting material.

On the other hand, when the retail value of the tinting material is more than 10 percent of the total charge, the repairman is the retailer of the material, and must segregate on the customer's invoice and in his records the fair retail selling price for the material. 8/25/92.

315.0335 **Training Customer's Staff.** As a part of the ''installation charge,'' taxpayer spends two-thirds of the time charged for ''installation'' on training the staff of the customer in operating and maintaining the new machinery.

Charges for such training which are separately identifiable and optional to the customer may be excluded from the measure of tax. On the other hand, if the training is practically or contractually mandatory, then the charges applicable to the training may not be excluded from the gross receipts of the machinery. 10/4/76.

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315.0340 **Tuning, Testing and Adjusting of Organ.** Separate charges for labor of tuning, testing, and adjusting during installation of, for purpose of adapting tone to the acoustics of the building in which installed are deductible as installation charges. 9/21/50.

315.0345 **U.S. Government Contract—Repairs.** A firm providing yearly maintenance services for medical equipment for the United States is a consumer of parts used in the maintenance. Although the contract with the United States provides in part "all newly installed replacement parts became the property of the government," the provision does not affect the application of tax. Such a clause does not provide that title passes prior to the use by the taxpayer. The lack of a timely passage of title is the factor which distinguishes the contract from the contract in the *Aerospace Case.* 3/9/93; 5/20/96.

315.0349 **Waterbeds.** The connecting of the components of a waterbed constitutes taxable assembly labor and not nontaxable installation labor. Filling a waterbed with water is nontaxable installation labor and is nontaxable even if not separately stated. 10/17/80.

(b) EXCHANGES OF USED FOR RECONDITIONED PROPERTY
See Vehicle Engine Exchanges.

315.0353 **Airplane Engine Exchanges.** A small commercial aviation operator contracts with the manufacturer of the engines which it uses on its aircraft to provide engine maintenance and repair. The manufacturer similarly contracts with several other small operators to provide the same engine maintenance and repair. Since these small operators cannot afford to have an inventory of engines used as modular repair units, the manufacturer owns and maintains a pool of such modules. The operators are charged for participation in the pool by a fixed charge based on operating hours. All modules removed for maintenance or repair are replaced by other modules from this pool to minimize aircraft down time.

The module transactions are regarded as the exchange of used for reconditioned similar property. The amount subject to tax is the amount charged by the engine manufacturer for participation in the pool. 9/21/83.

315.0360 **Bumpers Rechromed.** Auto bumpers which are sent out for rechroming are taxable if the general practice of the chroming industry in a given area is to commingle bumpers received so that the customer receives an equivalent bumper, though not necessarily the same one. However, if the rechromer keeps adequate records to prove that the bumper returned is the identical bumper sent in, the charge is nontaxable as a repair. 1/29/69.

315.0370 **Core Deposits.** New Parts: The customer purchases the parts, leaves a core deposit, and is charged tax on the total. Later, the customer brings in a used part. Under these circumstances, the customer would be entitled to a refund or credit for the core deposit only. Tax paid with respect to the core deposit should not be refunded or credited to the customer.

Reconditioned Parts: The customer purchases the part, leaves a deposit, and is charged tax on the total. Later, the customer brings in a used part. Under these

circumstances, the customer would be entitled to a credit or refund of the core deposit plus tax paid with respect to it. 2/27/80.

315.0380 **Deposits.** If the original transaction is clearly understood and designated to be an exchange, the tax will not apply to the amount of deposit placed with the retailer to insure delivery to him of the worn part, in the event that the customer does deliver the worn part to the retailer and receives a refund of the deposit. The amount of the deposit should, of course, be entered separately in the retailer's books as a deposit.

In the event that the customer does not deliver the worn part to the retailer pursuant to the exchange agreement, the transaction will be regarded as a straight sale of the reconditioned part.

In this event the retention of the deposit by the retailer will be regarded as an appropriation of the amount thereof to the payment of the retail sales price of the part, which will be regarded as the full amount charged by the retailer, including the amount originally received as a deposit. The tax will apply, in this case, to the full retail sales price. 1/19/50.

315.0400 **Deposits—Reimbursement.** Auto parts stores may use, in a proper case, that portion of the Regulation 1546 which allows tax to be measured, in the case of an exchange of a worn part for a reconditioned part, by the cash received. Where a "core deposit" is taken to insure that the worn part will be turned in after the reconditioned part replaces it in the car, tax reimbursement should be charged on the deposit to protect the retailer in case the worn part is not turned in and the deposit forfeited. In this case, the transaction is a straight cash sale. However, tax reimbursement on the deposit must be returned to the customer with the deposit, otherwise it constitutes excessive tax reimbursement under Section 6901.5. 11/4/64; 9/29/89.

315.0410 **Identical Property.** In order for Regulation 1546(b)(4) to apply, the reconditioned property must be virtually identical to the used property delivered by the customer. This type of transaction is the functional equivalent of one in which the customer's own property is reconditioned and tax applies only to the value added or exchange price of the reconditioned property. If the property delivered by the customer is not virtually identical, it is a "trade-in" under Regulation 1654(b)(1). 11/29/90.

315.0415 **Subcontracted Repairs.** Regulation 1546(b)(4) applies to the exchange of a reconditioned part for a used part. The focus is on the character of the goods, not on the act of reconditioning. Thus, whether the reconditioned part is repaired by the retailer or the retailer's subcontractor is irrelevant. In either event, tax is measured by the amount the repairman or reconditioner charges for the repaired or reconditioned property. 5/9/90.

(c) MISCELLANEOUS REPAIRS

315.0420 **Conversion of Transport Loader** from hydraulic to mechanical operation constitutes a repair operation in which value of repair parts used is substantial. 8/1/51.

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315.0440 **Convertible Top.** Putting a new top on an automobile is regarded as a repair or reconditioning operation. The materials furnished, however, are regarded as the fabricated top ready for installation, rather than the materials from which the top is fabricated. The tax, accordingly, applies to all charges for fabrication but does not apply to separately stated charges for removing the old top and installing the new. 5/29/51.

315.0460 **Cotton Picker Spindles.** Charges for resharpening and rechroming mechanical cotton picker spindles resulting in the restoration of the spindle to approximately its original condition, are exempt from tax. 7/2/53.

315.0480 **Electric Clocks.** Repairers of electric clocks are regarded as retailers of parts and materials furnished if the retail value of such parts and materials is more than 10% of the total charge, or if a separate charge is made for such property. 1/5/77.

315.0500 **Embossing** customer's name on new milk cans, charge for is taxable, but not on used cans. 1/26/50.

315.0520 **Fire Extinguishers, Recharging.** The sales tax applies to that portion of the price for recharging fire extinguishers which represents the fair retail value of the materials furnished. 5/11/54.

315.0525 **Fringe Replacement on a Rug.** Replacing fringe on a rug is a repair operation. As such, the repairer is either the retailer or the consumer of the materials used to make the repair, as governed by Regulation 1546(b). 12/21/92.

315.0540 **Lacquering** new film, charges for, are taxable, while charges for lacquering old worn and scratched film are nontaxable repair charges. 6/13/51.

315.0555 **Locksmith.** A locksmith is hired to furnish a new key for a vehicle ignition lock. The locksmith makes separate charges for going to the customer's location, for disassembly and reassembly of the steering column, and for the key.

The charge for travel is for service and is not subject to tax. The charge for disassembly and reassembly of the steering column is regarded as a charge for repair labor which is not subject to tax. It involves the reconditioning of property to refit it for the use for which it was originally intended. The charge for the key is taxable as a sale of tangible personal property. 10/27/82.

315.0580 **Lubricants Used in Lubrication Service,** where no separate charge made for, regarded as consumed by lubricator whereas transmission and motor oil are regarded as resold. 3/19/52.

315.0600 **Machinery Rolls,** chrome plating of used, is regarded as a repair operation and the plater is regarded as the consumer of materials used, if he does not make a separate charge for such materials. 9/26/50.

315.0606 **Modifying a Machine.** A taxpayer has a contract to modify an offset type printer to operate in the manner for which it was designed. The machine malfunctioned from the day the taxpayer's customer received it. The taxpayer has been retained to perfect the logic of the pick and place system. In order to

accomplish this, the taxpayer will need to spend considerable time learning about the functions the machine was designed to perform and then determine how to correct the machine so that it will operate as originally intended. The cost to repair the machine will be approximately one third of the original cost of the machine itself. About 80 to 90 percent of the labor will involve reworking the existing hardware. Approximately $10,000 will be spent on the project, with $1,000 or approximately 10 percent of the repair, attributable to replacement parts.

Based on the above information, any fabrication or manufacturing relative to the printer is to refit a used piece of equipment for the use it was originally intended. Accordingly, the taxpayer will be performing repairs within the meaning of Regulation 1546. As set forth in Regulation 1546, the taxpayer is regarded as the retailer of the parts and materials it furnishes in connection with its repairs if the retail value of that property is more than 10 percent of the taxpayer's total charge, or if the charge for the property is separately stated to the customer. When the repairer fabricates a part, the charge for the fabrication is part of the retail value of the part, and is not regarded as repair labor.

When the retail value of the parts and materials furnished (including any fabrication of parts) is 10 percent or less of the taxpayer's total charge and the taxpayer does not separately state a charge for that property, the taxpayer is considered the consumer of the parts and materials. When the repairer is regarded as consuming the parts, sales or use tax applies to the sales price of such property to the repairer. Whether a consumer or a retailer of parts, the repair charges for repair labor are not taxable. The taxpayer's charges for repair labor are not taxable. 6/14/95.

315.0610 **Mounting and Balancing.** The separately stated charges for mounting of a tire on a wheel are not taxable if the service is optional with the customer. The fact that the retailer sold both the tire and the wheel does not alter this conclusion. Likewise, charges for the balancing of the tire are nontaxable when separately stated. The retailer is the consumer of weights or valve stems unless a separate charge is made for them. 3/21/75.

315.0640 **Plating.** Rechroming of parts of a used automobile is considered a repair operation. The plater is the consumer of the materials used and sales tax does not apply to the charges for such rechroming, provided the rechromed part is the identical part delivered to the repairer for rechroming. 5/6/54.

315.0660 **Printing Press Units.** Use tax does not apply to the charge for reconditioning labor performed in the alteration of used printing press units to adapt them to smaller news-print rolls and narrower columns. The tax applies, however, to the charge for any materials or parts furnished in connection with the reconditioning. 10/22/62.

315.0680 **Purifier of Used Transformer Oil and Used Paint Thinner,** who does not commingle materials of different customers, treated as repairer not furnishing any parts or materials. 12/14/50.

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315.0700 **Rebabbitting.** Charges for rebabbitting a bearing constitute a repair operation. If a lump-sum charge is made for labor and materials and the value of the materials is insignificant in relation to the total charge, the repairer is the consumer of the materials. If the value of the materials is substantial, the repairer is regarded as the seller and tax applies to the fair retail selling price thereof. 4/16/54.

315.0710 **Reboring of Pipe Mold.** In its production of cast iron pipe, a foundry purchases new steel pipe molds. These flask molds are 10 feet in length and come in various sizes capable of producing cast iron pipe ranging in diameter from 1½ to 8 inches. The average life of a pipe mold is 600 to 1000 castings, after which the mold becomes so pitted that it is no longer usable. Except in the case of the molds for the largest size pipes, the new pipe molds contain sufficient steel to permit them to be rebored once. This reboring process doubles the life of a mold and enlarges its interior dimensions, resulting in the production of a larger pipe. For example, 1½ inch and 2 inch pipe molds were rebored to make 3 inch molds.

The reboring process which extends the life of the molds and which, necessarily, also enlarges them, should not be considered fabrication or creation of tangible personal property. The dies are in a completely fabricated condition when originally purchased. The pipe molds are specifically designed and purchased with the idea of extending their life by reboring. The alteration in size of the molds which results from the reboring process is not a substantial modification and their use remains essentially unchanged. Aside from the enlargement of the interior dimensions, the molds are, in fact, restored to their original condition. Reboring is the only practical way of performing this restoration and it is not a substantial change as to be considered fabrication. The reboring process constitutes repair and reconditioning labor and is not subject to tax. 12/28/79.

315.0720 **Rebuilding and Enlarging** of cabin on pleasure boat, adding sleeping facilities, boat remaining pleasure boat, treated as repair, not fabrication operation. 2/2/51.

315.0740 **Rechroming.** Polishing and rechroming of used stainless steel parts constitutes a repair activity and the person performing such work is the consumer of all materials used and the tax does not apply to his charges. 11/5/54.

315.0760 **Reconditioning of Saw Blades.** Where the identical saw blades delivered to a reconditioner are not returned to the customer and in lieu thereof similar blades are returned, the tax applies to the amount charged by the reconditioner for the reconditioned property. 4/10/53.

315.0765 **Refurbishing of Lighting Fixtures.** A taxpayer contracted with the owner of a chain of restaurants to rework the old lighting fixtures in the restaurant and to install energy saving fluorescent lamps. The contract called for the taxpayer to paint, repair and refurbish the old lighting fixtures. The refurbishing of the old lighting fixtures consisted of removing the plastic pieces and cutting

glass to fit in the existing fixtures. The glass was soldered in place and a portion of the glass was beveled. The customer was billed for the amount of labor and material separately.

Even though the fixture was cosmetically more attractive and more energy efficient because of the fluorescent bulbs, the light was now refit for the use for which it was originally produced. Therefore, the labor was repair or reconditioning and not fabrication labor. Tax applies to the sales price of the parts and materials which were billed separately. 6/2/91.

315.0766 **Repair Parts Shipped Out of State.** A company enters into optional maintenance contracts with purchasers of its equipment. The customer sends the part to be repaired to the company. The company sends the part to an out-of-state repairer. The repairer returns the repaired parts to the company and the company sends its technicians to the customer's location to install the parts. In some cases, the part may be sent by the company to the customer for installation by the customer. The out-of-state repairer sells parts to the company as part of the repairs. Since those sales occur outside California, sales tax does not apply. The tax, if applicable, is use tax. However, the storage of the parts in California for future use solely outside California is not subject to use tax. The installation of the parts by the company's technician is a taxable use. If the installation by the company occurs outside the state, tax does not apply. However, if the company ships refurbished parts to out-of-state customers for installation by the customer, tax applies at the time of shipment. This is because at the time of shipment, the company passes title to the part to the customer in California making a complete use of the part in meeting its obligation under the optional warranty. Such use does not come within the section 6009.1 exclusion. 12/6/93.

315.0768 **Service/Supply Kits.** A company that sells photocopy machines and related services and supplies also sells an optional service/supply kit. The kit is optional when sold with the copier and the customer can buy additional kits at a later time. The kit consists of all the service and supplies, except paper, that is necessary to run the copier for a fixed number of copies. The amount of ''service'' required to maintain the machine for the required number of copies under the agreement is not determinable at the time the kit is purchased. Presumably, the ''service'' provided under the service/supply kit consists of the furnishing of labor and materials (i.e., parts) necessary to maintain the copier for the required number of copies.

The sale of the service/supply kit is a sale of both an optional maintenance service contract and tangible personal property for a lump-sum price. A charge for an optional maintenance contract is nontaxable. Where both taxable and nontaxable items are sold for a single price, an allocation must be made between the taxable and nontaxable charges. The fair retail selling price of the supplies initially furnished under the contract must be segregated on the invoices to the customer and in the records from the charges for the optional maintenance contract. Tax only applies to the fair market value of supplies initially furnished to the customers under the service/supply agreement. Since the company is considered the consumer of the parts and materials used in the maintenance

contract to repair the copier, the sale of such items to the company for subsequent use in meeting its obligation under the maintenance contract is subject to tax. 5/1/84.

315.0770 **Solar Window Tinting and Vinyl Pinstriping.** A taxpayer requested information regarding the sales tax application for applying solar window tinting and vinyl pinstriping to commercial storefront windows, homes, cars, boats and airplanes. The customers are billed for a single lump sum, with no separate itemization of materials and labor.

When tinting or pinstriping real property, (store-front windows and homes), the taxpayer is a construction contractor and the consumer of such property. The sale of the property to the taxpayer, or the use of the property, is subject to sales or use tax.

At the time of performing the tinting, it is assumed that the windows are component parts of used, rather than new vehicles, vessels, and aircraft. Based on this assumption, the taxpayer is performing repairs. Since there is no separate charge for the property, furnished in connection with the repairs (tinting), the taxpayer is the consumer of such property if the retail value is 10 percent or less of the total charge. The sale of the property to the taxpayer, or the use of the property, is subject to sales or use tax. When the retail value of the property furnished in connection with the tinting is more than 10 percent of the total charge, the taxpayer is the retailer of such property, and must segregate on the invoices to the customers, the fair retail selling price of such property.

Pinstriping cars, boats and airplanes is considered the same as applying lettering to these items. Lump sum charges for pinstriping vehicles, vessels, and aircraft are not subject to tax. Sales tax reimbursement should be paid when purchasing the items applied as pinstriping. 8/25/92.

315.0780 **Reprocessing of Welding Flux.** This constitutes a repair operation in which parts furnished are insignificant. However, if identical flux is not returned to the customer, the ‘‘exchange’’ rule governs. 10/25/51.

315.0800 **Rethreading of Pipe.** Charges for rethreading damaged pipe brought in by customers constitutes repair work restoring property to its original condition and exempt from tax. 6/26/53.

315.0820 **Retipping of Tools.** The repairman is the consumer of materials used in the retipping of oil well drilling tools, the materials not being a separately identifiable part and their cost being insignificant in relation to the total charge. 8/9/57.

315.0840 **Stress Relieving.** Preheating of pipe to relieve stress is a repair operation rather than fabrication and exempt from tax. 10/6/54.

315.0860 **Television Sets,** conversion of used sets to larger screen size is regarded as repair or reconditioning, not as fabrication, and tax applies to charge for materials only, if separately stated. 1/12/50.

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315.0880 **Television Sets.** Under a lump-sum agreement the picture tube of a used television set is replaced, the balance of the set is overhauled, new parts installed where needed, and the parts and labor are guaranteed for one year. The repairer is the retailer of whatever parts are furnished, whether originally furnished or pursuant to the warranty. The transaction involves exempt repair labor. Sales tax applies to the sale price of the parts, same to be determined by the fair retail price of such parts. 10/21/55.

315.0885 **Titanium Nitride Coating.** The titanium nitride coating of used cutting tools constitutes a repair operation and if a lump-sum charge is made for labor and materials and the retail value of the materials is 10 percent or less of the total charge, the repairer is the consumer of the coating material and tax applies to the purchase price of the property to the repairer. (Regulation 1546(b)(2).)

When a new tool is coated for a consumer, it constitutes a fabrication process and the total charge is subject to sales tax (section 6006(b)). The coating materials incorporated into the new tool may be purchased ex-tax by issuing a resale certificate or a tax paid purchases resold deduction may be taken for those material purchased tax paid and resold.

The coating of new items for a dealer who will resell the tool is also considered a sale even though the dealer furnishes the item. Since the coating is done for dealers who will resell the tools, the coating material may be purchased ex-tax for resale. (Regulation 1525(b).) 5/5/88; 2/16/88.

315.0900 **"Undersealing"** of used car constitutes a repair operation in which value of materials furnished is insignificant. 1/8/52.

315.0908 **Vehicle Window Retinting.** Retinting restores a used vehicle's windows to its former condition and is a repair operation. If the person makes a separate charge for the materials used or if the retail value of those materials constitute more than 10% of the total charge, the person is a retailer of the materials. Otherwise, the person is the consumer of the materials. 10/24/89.

315.0920 **Welding.** In the manufacture of pipe by electric welding, a flux is used on the weld which becomes waste slag. A process has been developed to return this slag to its original form by heating and crushing. Each manufacturer's lot of slag will be kept as a separate unit without mixing it with any other lot. No material is added. The charge made for this work constitutes reconditioning not subject to sales tax. Under Regulation 1546, however, if there were any commingling of different customer's lots of slag, the tax would apply. 11/17/54.

315.0940 **Wheel Weights.** Wheel balancer is consumer of weights used unless he separately states the charges. 8/2/77.

INSTITUTIONS
See Hospitals, Institutions and Homes for the Care of Persons.

INSURANCE COMPANIES
See Banks and Insurance Companies.

INTANGIBLE PROPERTY
See Tangible and Intangible Property.

320.0000 INTEREST AND PENALTIES—Regulation 1703

320.0020 **Bankruptcy—Postbankruptcy Interest and Penalties.** The board may collect postbankruptcy interest and penalties after a proceeding under Chapter XI of the Bankruptcy Act is closed. Section 17 of the Bankruptcy Act provides in part that a tax debt is not affected by a discharge in bankruptcy. Section 371 of the Bankruptcy Act provides: ''The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement but excluding such debts as, under Section 17 of this Act, are not dischargeable.'' The cases of *Salsbury Motors, Inc.* v. *United States et al.,* 210 F.2d 171, and *Paul F. Bruning* v. *United States,* 11 L.Ed.2d 772, support the board's position that it may collect postbankruptcy interest and penalties after a proceeding under Chapter XI of the Bankruptcy Act is closed. The board is precluded from claiming penalties in claims filed in both ordinary bankruptcies and Chapter XI proceedings because of the prohibitions contained in Section 57(j) of the Bankruptcy Act. Although Section 57(j) specifically applies to ordinary bankruptcy proceedings, under Section 302 of the Bankruptcy Act relating to Chapter XI proceedings, it is stated that the provisions of the first seven chapters of the Bankruptcy Act apply insofar as Chapter XI proceedings are concerned where such provisions are not inconsistent. 10/9/64.

320.0045 **Bankruptcy Setoffs.** The Bankruptcy Code does not permit setoffs of post petition debts on pre-petition claims because of the absence of the mutuality of the debts required by Section 553(a) of the code. The pre-petition debt relates to the debtor while the post-petition debt relates to the bankrupt estate. 1/7/91.

320.0047 **Credit Interest.** A corporation went through a merger and reorganization. This caused a disruption in its accounting department, and resulted in overpayment of taxes for a period of two years. Recognizing that the reorganization disrupted the corporation's normal accounting activities, credit interest was allowed on the tax overpayments for a period of the next six months. The continuing errors beyond six months were regarded as evidence of carelessness, and credit interest was not allowed beyond those six months. 4/12/94.

320.0048 **Credit Interest.** Assuming that a timely, valid claim for refund is received, the Board is only authorized to pay credit interest on the overpayment of tax. Revenue and Taxation Code § 6907 expressly limits the payment of credit interest to refunds or credits arising from the overpayment of tax. Overpayments of interest and penalty are credited or refunded without the payment of credit interest. 9/18/02. (2003–3).

320.0048.050 **Credit Interest.** Civil Code section 1793.25 (''Lemon Law claims''), subsection (c), expressly prohibits the payment of credit interest when the Board approves a manufacturer's Lemon Law claim for sales tax reimbursement. 10/21/02. (2003–3).

INTEREST AND PENALTIES (Contd.)

320.0049 **Date of Interest Computation.** Even though an exemption under section 6388.5 provides that property must be removed from the state within 75 days from and after the date of the delivery, interest is calculated based on the due date of the tax on the sale if the property is not removed from the state in the required days. The exemption does not provide a 75 day extension for the due date of taxes on the transactions that could, but do not, qualify. A transaction is either exempt under section 6388.5 or it is not. If not, the due date of the tax is based on the date of sale, as with any other taxable transaction, and not on the date of the sale plus 75 days. 1/7/88.

320.0050 **Denial of Credit Interest.** A consistent practice of making additions of tax to quarterly sales and use tax returns may be classified as intentional overpayments even though the additional amounts were intended to correct underpayments made for prior periods. Sales and use tax returns are required to record the liability for the reporting period. They may not be used as a means of making payments of an existing deficiency for a prior period. 6/2/78.

320.0055 **Effective Date of Payment.** Government Code section 11002 provides in part that funds are ''deemed received on the date shown by the post office cancellation mark stamped upon the envelope containing the remittance . . . .'' In the case of remittances received via a levy served on a bank, the effective date of payment is the date of service not the date of payment by the bank since the Board had ownership as of the date of service. 10/3/90.

320.0057 **Excusability of Interest.** Generally, a taxpayer may not be excused from payment of interest. The two statutory exceptions which would excuse the payment of interest on a tax liability are (1) if the liability was a result of a ''disaster'' as defined in Regulation 1703(b)(6) or section 6593, or (2) if the taxpayer relied on written advice from the Board (section 6596). 2/11/88.

320.0060 **Failure to File Return.** A seller is not excused from filing a return merely because the purchaser reports the transaction ''on a use tax basis,'' and the 10 percent penalty applies to any balance of tax due after giving effect to all adjustments and credits for tax paid by purchaser. 4/7/53.

320.0080 **Failure to File Return.** When a person becomes a retailer under Section 6019 upon making a third sale within a 12-month period, the 10% penalty under Section 6511 does not apply to the tax which then accrues on the two preceding unreported sales made in prior quarters, provided the tax on all three sales is timely reported after the third sale. 4/13/59.

320.0100 **Fraud.** Failure to file returns with intent to evade the tax is established where an out-of-state business collects use tax from its customers for a period of years and fails to pay it to the state. 10/4/65.

320.0110 **Fraud Penalty on Corporation.** A corporation is a person under section 6005 of the Revenue and Taxation Code. If a fraud penalty is properly applied against a corporation, the fact that the stock is purchased by a person who had no participation in the fraud provides no basis for relief from the penalty. 6/21/94.

INTEREST AND PENALTIES (Contd.)

320.0120 **Fraud Prosecutions.** Although the Board may be estopped from instituting criminal prosecution for fraud after the periods specified in Revenue and Taxation Code Section 7154 have expired, the imposition of the fraud penalty on a determination for these same periods is not barred by this section. 1/30/90.

320.0123 **Fraud, Theft, and Embezzlement.** Section 6593 provides for relief from interest for taxpayers whose failure to file returns or pay timely is due to a disaster. Fraud, theft, and embezzlement are not regarded as disasters within the meaning of the statute. 7/22/87.

320.0125 **Interest—Nonabatement.** A determination by the Board to ''delete the failure to file penalty and redetermine the tax on a sales price of $140,000'' did not result in the abatement of interest. Section 6593 provides for relief of interest where failure to file a return timely was due to a ''disaster.'' In this instance, the failure to file timely was due to an apparent misunderstanding by the taxpayer who believed the Coast Guard was going to tell the Board to send a bill for tax upon completion of the documentation process. This is not a ''disaster'' covered by section 6593.

Additionally, this matter is not eligible for ''settlement'' consideration pursuant to section 7093.5, as the applicable section pertains only to settlement of certain ''civil tax matter disputes.'' The object of the section was for the purpose of producing a settlement during the administrative process. Since there is no longer any on-going administrative process, this matter is beyond that stage. The available remedy is to pay the liability and file a claim for refund. 4/11/94.

320.0129 **Interest and Penalty—FDIC Receivership.** The late filing of a tax return by FDIC, acting as receiver of a closed thrift and loan association, is subject to the interest imposed by section 6591 but not to the penalty discussed therein. In as much as the association's seller's permit remained in effect during the receivership and FDIC had not requested a permit in its own name as receiver, the penalty and interest was billed to the association. The rights and protections of FDIC as a receiver are contained in 12 U.S.C. section 1825. The courts have interpreted this section to mean that it ''prevents local taxing authorities from forcing FDIC to pay penalties for the failure of previous owner to pay taxes.'' It also said that FDIC would not have to pay interest on late taxes if it could be shown that the interest imposed was in the nature of a penalty, and was not ''to compensate the taxing unit for not having such tax money available to pay its obligations.'' Since the Board collects interest for exactly that purpose and not as a penalty, the assessment of interest on the late payment is proper and payable by the FDIC, although the penalty is not payable by the FDIC. 3/9/94.

320.0131 **Late Tax Payment.** Interest for a late payment of tax accrues at a monthly rate and if any payment of tax is late, the full monthly rate is applicable for any portion of a monthly period for which the tax has not been paid. 6/18/93.

320.0133 **Multiple Penalties for Fraud.** Several sections of the Revenue and Taxation Code impose penalties for fraud or intent to evade tax. Only one such

penalty can be imposed on the same determination when the penalties apply to the same series of acts or course of action. 5/19/86.

320.0140 **Negligence Penalty** of 10% not warranted where sales are not reported because of belief in exemption as exports and bona fide difference of opinion as to taxability. 7/26/50.

320.0160 **Prepayment.** The penalty provided for under Section 6476 applies only to the amount for which a prepayment is required, not the amount of advance payment actually made. 11/16/66.

320.0180 **Purchaser Liable for Sales Tax.** A purchaser who becomes liable for payment of sales tax as if he were a retailer making a retail sale under the provisions of Section 6421 of the Revenue and Taxation Code has an obligation to file returns and is subject to the failure to file penalty provisions of Section 6511 of the Revenue and Taxation Code. 9/3/64.

320.0210 **Resolution Trust Corporation.** Interest and penalties are properly part of the tax liability and should be paid by the Resolution Trust Corporation. 12 U. S. C. section 1821(d)(2)(H) states: ''The [Resolution Trust] Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.'' 10/30/92.

320.0220 **Relieved of Penalty and Interest.** If a taxpayer is eligible to be relieved of a penalty and/or interest pursuant to Revenue and Taxation Code sections 6592 and 6593, it is irrelevant that the penalty and interest were assessed by a determination. 6/11/93.

320.0240 **Return Not Filed for Another Location.** The ''failure to file'' penalty applies when a person files no return. If a person files a return, the failure to file penalty does not apply even if that person's return did not include sales made at another unpermitized location for which a permit should have been held. 11/22/82.

325.0000 INTERSTATE AND FOREIGN COMMERCE—Regulation 1620

Common carriers, sales to, see also Sales to Common Carriers. Leases of transportation equipment used in, see also Leases of Mobile Transportation Equipment. Morticians, sales in interstate and foreign commerce by, see Morticians. Rentals or leases involving, see Leases of Tangible Personal Property—In General.

(a) IN GENERAL—SHIPMENTS INTO CALIFORNIA FROM POINTS OUTSIDE STATE

325.0001 **Advertising Circulars—Title Passing Out of State.** A California firm orders advertising circulars to be printed by an out-of-state printer. The purchase order provides that the title will pass to the firm at the location of the out-of-state printer at the time the printing order is completed.

INTERSTATE AND FOREIGN, ETC. (Contd.)

The order is communicated by United States mail or by telephone to the out-of-state printer. Follow up on the printing order is done by telephone, mail, and through the printer's agents or representatives in California. The contact in California is for the purpose of obtaining the advertising copy that will be used by the out-of-state printer in printing the circulars. Such copy might consist of paste-ups, type-setting, or other prepared work done in California by the agent of the out-of-state printer.

The California firm does not take delivery of all the circulars. The out-of-state printer will mail circulars to potential California customers, deliver to common carriers for delivery to stores as store copies, or deliver to common carriers for delivery to publishers located in California for insertion in publications.

Based on the fact that title to the printed circulars passes to the purchaser outside California, the transaction is not subject to sales tax because the sale took place outside California. Therefore, circulars shipped to the customer's California stores for use as store copies are subject to use tax. The circulars shipped to publications and inserted into newspapers or periodicals which are exempt under section 6362 are exempt from the use tax. Circulars mailed by the out-of-state printer to addresses in California are not subject to use tax because the mailing from the out-of-state printer is regarded as an out-of-state use. 6/15/82.

(Note: Subsequent statutory change re printed sales messages, section 6379.5.)

325.0002 **Aircraft—In-State Pilot Training.** Use tax does not apply to the use of an aircraft purchased out of state and brought into this state within 90 days of purchase and used solely in interstate commerce for the six month period following its first entry into California. In-state training flights in aircraft will not affect the availability of the exemption if the flights are for the purpose of training personnel who will fly that specific aircraft, as contrasted to that type of aircraft. 4/29/94.

325.0002.100 **Aircraft-Interior Installation and Test Flights.** An aircraft purchased out of state is brought to California for the purpose of having the interior installed and for test flights. The aircraft had been registered to the manufacturer as an experimental aircraft (flown about 200 hours). Under the contract of sale, the purchaser will take delivery outside this state. The manufacturer invited the purchaser to conduct visual inspections of the aircraft during its completion (installation of interior). The purchaser was also invited to be present to observe and advise the manufacturer's employees of any problems during test flights. The purchaser's employees or agents are not authorized to take possession or control of the aircraft on the purchaser's behalf in connection with any test flight. Also, the aircraft will be painted outside California and the purchaser's employees or agents will be aboard for the flight from California to the out-of-state painting destination. They will be aboard to observe how the interior of the aircraft reacts to condensation or otherwise at high altitude during an extended period of time. The employees or agents will not be authorized to take possession or control during that flight.

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The aircraft's presence in California which is limited to the purposes of the aircraft's completion will not be considered in determining whether the aircraft is purchased for use in California. Also, the mere presence of the purchaser's employees or agents during the completion of the aircraft and on the aircraft during the test flights and for the flight out of state for the reasons stated above would not result in the conclusion that the purchaser took delivery of the aircraft in California. 12/11/91; 5/21/92.

325.0002.200 **Aircraft Modification.** An out-of-state resident purchases an aircraft out of state and first functionally uses it outside California (private and business). The owner thereafter has modifications performed on the aircraft outside California. The aircraft will then be flown within and without the United States. It is anticipated that the aircraft will not enter California within the first 90 days after the owner's acquisition and first functional use of the aircraft and that the aircraft will always be hangared outside California. However, the owner may eventually hangar the aircraft at an airport located in California.

The test applicable to the modifications is separate from the aircraft. That is, if the aircraft is used outside California for 100 days prior to its first entry into California, use tax will not apply to its use in California. If the modifications are performed after 50 days of use outside of California, and then the aircraft, with those modifications, enters California 50 days later, the modification will be presumed to have been purchased for use in California, since the modified aircraft would have entered within 90 days of purchase, even though the aircraft will not be regarded as having been purchased for use in this state. Thus, use tax would apply to the purchase price of the modification unless the modification (i.e., the modified aircraft) is used or stored outside of California one-half or more of the time during the six-month period immediately following the first entry of the modification in California.

If the aircraft does not enter California within 90 days of the purchase (and first functional use) of the modification, excluding time of shipment and time of storage for shipment to California, California Use Tax will not apply to either the purchase of the aircraft or the purchase of the modification. 7/09/96.

325.0003 **Aircraft Used Exclusively in Interstate Commerce.** A corporation purchases an aircraft that was first functionally used in interstate commerce outside California, entered California in the course of such use, and was then used continuously in interstate commerce while in California. However, several trips were made from San Jose to Long Beach Airport for purposes of service and maintenance. On these trips, only the crew members were on board.

If the sole purpose of the intrastate flights was to transport the aircraft to Long Beach for service and maintenance, the flights would not prevent the exemption from use tax based on exclusive use in interstate commerce. 3/17/92.

325.0003.200 **Aircraft Used Exclusively in Interstate Commerce.** A corporation will take delivery of an aircraft outside California that will be first functionally used in interstate commerce before it enters California. It will thereafter be used in interstate commerce while in California. It is intended that

INTERSTATE AND FOREIGN, ETC. (Contd.)

the aircraft will be principally hangared at Van Nuys Airport. However, on the initial trip into California, a passenger having an out-of-state origin will be dropped off in San Francisco and the aircraft will be dispatched empty to Van Nuys Airport, the aircraft's home base.

The corporation has a maintenance facility at a California airport and the aircraft will have flights to and from that California airport (or other locations in California) solely for the purpose of maintenance.

The trip from San Francisco to Van Nuys on the initial flight into California would be considered a part of the continuous journey from outside California provided that flying the aircraft empty to Van Nuys was a part of the original flight plan. However, if any passengers or cargo are loaded in San Francisco, the trip will be regarded as an intrastate use.

Flights to the maintenance facility in California solely for purpose of maintenance are regarded as incidental to interstate use provided the aircraft is otherwise used continuously in interstate commerce both inside and outside California and not exclusively in California. If any such flight has an additional purpose, such as carrying cargo or passengers, that flight would not be regarded as incidental to interstate use. 11/7/90; 1/2/91.

325.0004 **Aircraft Refurbishing.** An out-of-state company purchases a used commercial aircraft which is delivered outside California with title and possession transferring out of state. Shortly after the purchase, the first functional use of the aircraft is transporting representatives of the purchaser to another location outside California. Prior to ninety days from the date of purchase, the aircraft is flown to California for refurbishing which includes the installation of a new interior to modify the aircraft for noncommercial use. The refurbishing in California will take more than six months to complete. Upon completion of the refurbishing, the aircraft will be delivered to the purchaser outside California. Thereafter, the aircraft will be used noncommercially, solely outside the state.

The installation of an interior in an aircraft is the incorporating of tangible personal property into other tangible personal property. Accordingly, the act of installing the interior does not constitute ''storage'' or ''use'' of the aircraft when the aircraft is to be immediately transported outside California and thereafter used solely outside this state. If the sole utilization of the aircraft in California will be that of installing a new interior, the use tax will not be applicable pursuant to Regulation 1620(b)(5). The transportation of the aircraft into California under its own power will also be excluded from the term use. 5/7/86.

325.0005 **Annual Reports.** An organization prints 14,000 annual reports in California, shipping from within this state 10,000 reports to New York and 4,000 reports to California. Assuming the 10,000 shipped to New York would be used out of California and were shipped in accordance with Regulation 1620, the sale of these reports would be exempt from the sales tax. The sales tax applies to the sale of the 4,000 reports shipped to the customer in California.

In a second situation, the organization has annual reports printed outside California and also shipped from the out-of-state point. As a retailer engaged in

business in this state, the organization is required to collect the use tax from the purchaser and report and pay it to this Board. Accordingly, the organization is required to collect and report and pay use tax on the sales price of the 4,000 annual reports shipped to the purchaser in this state. 3/8/93.

325.0007 **Cargo Containers and Chassis Used in Ocean Shipping.** A domestic shipping company is engaged in worldwide ocean shipping, and does not engage in transporting cargo from point to point within California. It purchases cargo containers and chassis that are used in its shipping operations. After a brief period following the purchase, the shipping company will sell the cargo containers and chassis to a trust and then lease them back from the trust. The sale and leaseback is governed by one master agreement but there are multiple deliveries of both containers and chassis to the trust over a period of several months. Tax application to the cargo containers and chassis is discussed below.

(1) Cargo Containers. The cargo containers are manufactured in foreign countries and the shipping company will take delivery of them at the manufacturer's premises and place them in service at the earliest possible moment. Title to the containers will pass to the shipping company outside of California. At the time of transfer to the trust and the leaseback to the shipping company, the containers will be physically located either outside of California, on the high seas, in a foreign country, or within California while being used in the course of worldwide shipping operations. Cargo containers entering California will be loaded with cargo and after delivery of the cargo, the containers will continue to be used in the shipping company's worldwide shipping operations.

(A) The sales of the cargo containers to the shipping company are retail sales and not sales for resale since the shipping company will put the containers to use prior to its sale to the trust.

(B) Since the sales of the containers to the shipping company takes place outside of California, the sales are not subject to the sales tax. Although the containers are not subject to sales tax and the first functional use of the containers takes place while the containers are located outside of California, use tax would nevertheless apply to the shipping company's use of the containers in California if the containers enter this state within 90 days from the date of purchase and are not continuously used in interstate or foreign commerce, or are not used by the shipping company outside of the state at least 50 percent of the time over a six month period. Use tax would not be applicable to any in-state use of the containers by the shipping company if the shipping company uses the containers outside of California in excess of 90 days from the date of purchase to the date of their entry into California exclusive of the time of their shipment unloaded with cargo to California.

(C) Sales tax applies to the sale from the shipping company to the trust for those cargo containers which are physically located within California at the time of sale, notwithstanding the fact that the containers are purchased by the trust for use in interstate or foreign commerce. Since cargo containers are mobile transportation equipment (''MTE'') under Regulation 1661, the trust as lessor of the MTE may make a timely election to report the tax measured by the fair rental

value as provided by Regulation 1661. Although sales tax does not apply to containers physically located out of state at the time of sale, the trust as lessor may nevertheless be liable for use tax when the property is purchased for use (lease) in California. Regulation 1661 provides that if the sale and delivery of the MTE occurs outside of California and the property is purchased for use by the lessor, use tax will apply measured by the purchase price unless the equipment enters the state in interstate commerce and is used continuously thereafter in interstate commerce, or the lessor makes a timely election to report his use tax liability measured by fair rental value.

When the containers are first functionally used by the trust outside of California in interstate or foreign commerce, the containers are nevertheless presumed to have been purchased for use in this state if they are brought into this state within 90 days from the date of the sale to the trust. This presumption does not apply, however, under the following conditions: (a) the property is used or stored outside of California one half or more of the time during the six-month period following its entry into California, or (b) the property is purchased for use and is used in interstate or foreign commerce prior to its entry into this state and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California.

(2) Chassis. Chassis are pulled by the tractor unit of a truck and can be used to carry cargo containers on highways. These chassis are manufactured within the United States, including California. Title to the chassis will pass to the shipping company while they are located at the manufacturer's premises and the manufacturer will deliver them to their ultimate destination, which will be in California in most cases. For the brief period between the shipping company's acquisition of the chassis and their resale to the trust, the shipping company will not make any use of the chassis. The sales of the chassis to the shipping company are sales for resale and the tax application to the subsequent sales from the shipping company to the trust is the same as that under paragraph (1)(C) above. 9/20/84. 12/5/01. (Am. 2002–3).

(Note: Subsequent statutory change concerning sales and leaseback and subsequent change to Regulation 1620, adding subdivision (b)(2)(B)2. re intermodal cargo containers.)

325.0009 **Corporate Aircraft Used in Interstate Operations.** An aircraft purchased out of state and brought into California within 90 days after purchase could qualify for the exemption provided in Regulation 1620(b)(2)(B) provided it is used continuously in the corporation's interstate operation (e.g., transportation of company's employees from one state to another). Intrastate flights in another state will not affect the exemption from the California tax. 9/15/83.

325.0010 **Deliveries from Storage.** A taxpayer manufactures, prints, and purchases for resale business forms and supplies. The taxpayer stores the merchandise in its warehouses and ships the merchandise, as needed, by common carrier to customers in California and in other states. Some customers periodically order merchandise to be stored in the warehouse until needed. A

customer may agree to a specific time limit for the storage of merchandise. The taxpayer may not know where specific merchandise so stored will be shipped until instructions are received from the customer. Some customers are billed for the merchandise when it is received for storage at the taxpayer's warehouse. Others are billed when the merchandise is actually shipped to the customer. The contract provides that title passes upon full payment.

When merchandise is shipped from an out-of-state warehouse to a California customer, California use tax would apply. If the customer incurs tax or tax reimbursement liability in the other state, the customer is allowed a credit for the tax or tax reimbursement liability actually incurred. However, if tax was paid to the other state in error, no credit would be allowed.

If shipment is made from a California warehouse to a customer's location outside the state and the contract specifically requires delivery to the out-of-state location, the tax will not apply even though title may have passed in California. This result is valid only if the purchaser is not authorized under the contract to direct that the property be diverted to a California destination.

If a shipment is made from a California warehouse to a California customer located in a different tax district, the applicable district tax is that of the destination district if the taxpayer is required by the contract to ship the merchandise to the customer in the other tax district.

If it is unknown at the time of the contracting whether merchandise will be shipped instate or out of state, the application of tax will depend on the time of title passage. Under the contracts provided, title passes upon full payment. Accordingly, if the customer is billed when merchandise is delivered to the taxpayer's warehouse, tax will apply at that time. If the customer is billed at the time that the taxpayer makes shipment, tax will apply at that time if the merchandise is shipped to a California location. Also, when billing takes place at the time of shipment, no tax applies if the merchandise is shipped out of the state pursuant to the contract of the sale. 8/26/94.

325.0010.750 **Delivery of Aircraft in Oregon.** A purchaser intends to take delivery of a jet aircraft in Oregon. The aircraft will not touch down in California on this flight. From the delivery point in Oregon, the aircraft will be flown to Nevada during which the purchaser will perform at least three landings for purposes of obtaining certification as a pilot for the aircraft. The aircraft will not touch down in California on this flight. The aircraft will be based in Nevada for 91–100 days and flown to non-California locations during this time. The aircraft will be regarded as first functionally used outside California when the taxpayer flies it in order to obtain pilot certification. Therefore, if the aircraft does not enter California within 90 days after its purchase, excluding time of storage for shipment to California, use tax will not apply to the use of the aircraft in California. 8/13/96.

325.0011 **Delivery to California Post Office for Redelivery.** A California consumer instructs an out-of-state printer/mailing house to ship packaged direct mail materials via common carrier to a post office in California for mailing from

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that post office directly to the addressees. Use tax does not apply to any of the printing or other charges related to the property delivered in this manner. Neither the carrier nor the post office can be said to be an agent of the consumer. The property began a continuous journey in interstate commerce when the out-of-state printer delivered it to the carrier at an out-of-state location. 8/24/84.

325.0011.450 **Delivery from In-State Warehouse.** Where the retailer ships the property sold from out of state to its warehouse located in California for assembly or consolidation of the property sold, and that warehouse location is the point from which the shipment is made to the customer, sales tax is the applicable tax. The local portion of the sales tax is allocated in accordance with Regulation 1802, sections (a) or (b)(5). Sales tax is applicable because the sale was completed in California by the retailer's shipment to the customer from a California location, and there was also participation by a place of business of the retailer, specifically its warehouse, in completing the delivery. The place of sale as defined in section 6010.5 is not the retailer's out-of-state location if the retailer does not complete its obligation with respect to delivery without first sending the property to its California warehouse. 8/11/89.

325.0012 **Delivery of Tractor—Trailers to Interstate Carriers.** An interstate carrier (lessor) purchased certain tractors, trailers, and converter gears out of state and leased them to its three subsidiaries. Two of the subsidiaries are interstate common carriers operating between points outside this state to points within this state. The other subsidiary is a radial carrier operating in California. Certain pieces of equipment were delivered to the lessor out of state and placed in revenue service of the lessee there. Other equipment was delivered to the lessor in California and placed in service of the lessee in this state. When in revenue service of the subsidiary lessee, the equipment was variously used in interstate commerce or intrastate commerce in California.

When the first functional use of an instrumentality of interstate commerce takes place in California, regardless of whether the property is used thereafter exclusively in interstate commerce and used more outside the state than within, it is proper to assert the use tax. Accordingly, use tax applies to all deliveries of the tractor-trailers in California to the subsidiary lessees.

However, when the first functional use takes place outside of California and after the first use it is employed continuously and principally in interstate commerce, the use tax does not apply. Of course, use tax applies to out-of-state deliveries of tractor-trailers to the lessee operating as a radial carrier in California since the property was immediately brought into California for use in intrastate commerce. 10/13/65.

(Note: Subsequent statutory change re trailers, see section 6388.5.)

325.0012.350 **Duplicate Copy of Software Source Code.** Database software purchased out of state is to be located and used in New York for at least 100 days after its purchase. The purchaser made a duplicate copy of the source code in New York on new blank media and delivered this duplicate copy to an escrow agent in California before 90 days elapsed from the date of purchase of the original.

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The delivery of the duplicate copy of the source code to an escrow agent in California does not affect the taxability of the original sale of the tangible media containing the original source code. When the duplicate copy of the source code is brought into California within 90 days after the blank media was purchased by the purchaser of the database, then the cost of that blank media plus the outside cost, if any, of copying the source code onto that media (but not the cost or value of the source code itself) would be subject to California use tax. 1/3/95.

325.0013 **First Functional Use Out of State but Returned to the State.** Two race engines were purchased out of state and delivered to the purchaser in California via common carrier in early 1971. The purchaser installed one of the engines in his race car and held the other one on standby as a backup engine. Although it was the purchaser's intent that the car and engine be raced in California, these engines were never tested or raced in the state.

Several months after purchase, both engines were removed from California via a trailer. Shortly thereafter, the car was raced in Arizona on March 26, 1971. After this race the engines were returned to California where they were stored. On April 27, 1971, they were transported outside the state to the East where they were used in the racing circuit. Unfortunately, the engines blew up. The purchaser, in turn, sold them back to the vendor instead of returning them to California.

Under the above circumstances, both engines are subject to the use tax. This conclusion is based on the following:

When tangible personal property is purchased and first stored or used in California, the item is subject to the California use tax notwithstanding the lack of some functional use in the state unless it comes within the exclusion provided in section 6009.1. Section 6009.1 provides, in part, that storage and use do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state. Since it was not the purchaser's purpose upon the initial storage or use in California to merely transport it outside the state for use thereafter solely outside the state (i.e., it was to be returned to California after the Arizona race and after the East Coast race), we do not believe that it can be said that such storage or use in California was only for the purpose for transporting it outside the state for use thereafter solely outside the state. Therefore, it is concluded use tax is due on both engines. Standby service is a use within the definition of "use" under section 6009. 9/27/71.

325.0013.200 **First Functional Use Test.** An opinion was requested regarding the legal department's position on the first functional use test as it applies to vehicles, vessels, and aircraft.

After a review of the Revenue and Taxation Code, Sales and Use Tax Regulations, and various court cases, including *American Airlines Inc.* v. *State Board of Equalization* (1963) 216 Cal.App.2d 180, it was concluded that if a vehicle or vessel is designed for commercial carriage, e.g., a bus, a tractor-trailer, or a sightseeing boat, the first functional use will be outside California if passengers are boarded or cargo is loaded onto the vehicle or vessel outside of

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California. If such vehicle or vessel is deadheaded into California, the first functional use will be in California unless the vehicle or vessel is brought to California to fulfill an existing lease or charter, or to pick up a specific load of cargo or group of passengers. The same applies to aircraft, though in some instances the purchase of such aircraft will be exempt under section 6366 or 6366.1.

Vehicles, vessels and aircraft which are purchased for commercial purposes and used for commercial purposes are not ''functionally used'' until used for the commercial purpose for which they were designed.

With respect to vehicles, vessels, and aircraft designed for personal use, such as a passenger vehicle as defined in Vehicle Code section 465, a small motor boat, or a small plane, the first trip or flight into California is a functional use outside of California without regard to who drives or pilots the vehicle, vessel, or aircraft or to whether it is carrying passengers or cargo.

Finally, regardless of what purpose the vehicle, vessel, or aircraft was designed for, the first functional use of such items will be in California if they are not brought into California under their own power and they have not otherwise been functionally used outside of California. 8/10/92.

325.0015 **First Use in Interstate Commerce.** An aircraft was leased by a California business from a lessor located in Oregon. On the date the lease expired, pilots who are employees of the lessee fly the aircraft from California to Oregon with some of the lessee's employees as passengers. At that point, the aircraft is sold to the lessee. The pilots then fly the aircraft to California with other employees of the lessee as passengers. The aircraft is used thereafter solely in interstate commerce. The first use of the aircraft is regarded as having been in interstate commerce because the lessee did not own the aircraft on the flight to Oregon. 10/19/87.

325.0016 **First Use in Interstate Commerce.** An aircraft is purchased by a California business in a state in which the buyer does not have a company location. An executive of the buyer is authorized to take delivery of the aircraft at the out-of-state point. The executive takes delivery and flies the aircraft to California together with two nonemployee passengers. The aircraft is used thereafter solely in interstate commerce. The fact that the buyer has no company location in the state of purchase has no bearing on regarding the first use of the aircraft as being in interstate commerce. 10/19/87.

325.0018 **Functional Use.** For purposes of Regulation 1620(b)(3), only *functional use* outside this state is counted in establishing out-of-state use. Time for assembly, disassembly, testing, preparation for shipment, and shipment does not count. 11/6/90.

325.0020 **General Rules Stated.** Corporation maintains manufacturing plant out-of-state and a sales office in California. Practically all products sold through California office are manufactured and fabricated out-of-state, but in some cases parts are fabricated at California office. Shipments of goods sold through

California office are often made directly from out-of-state factory to the consumer and point of delivery may or may not be within California.

When delivery is made to the consumer at a point outside of California, the sales tax would not apply. Where delivery is made directly to consumer in California, sales tax would not apply unless the California office of the seller participated in the transaction. If sales tax does not apply in the latter instance, the transaction is subject to use tax and required to be collected by the California office.

Sales in which delivery is made to points outside California from the California office would be exempt from tax providing the conditions of the regulation are met by the seller. 3/3/53.

325.0040 **Horses.** Breeding a mare and selling the foal can be consistent with holding the mare for resale because it proves to potential buyers that the mare is healthy and capable of reproduction. However, the taking of depreciation deductions on the mare for income tax purposes is inconsistent with holding it for sale in the regular course of business. If the mare was purchased outside the state and was purchased for breeding purposes in California, the purchaser is liable for use tax.

If the purchaser can show that the mare was not purchased for use in California, tax does not apply. See Sales and Use Tax Regulation 1620(b)(3). The breeding of the mare or the giving birth to a foal by the mare outside this state is a "functional use" of the mare outside the state within the meaning of the Regulation. 5/11/87.

325.0053 **Installation by an Agent of the Retailer.** A computer manufacturer, having no place of business in California, has an agent located in California who solicits equipment orders from California customers and forwards the orders to the manufacturer for acceptance. When the order is accepted, the equipment is shipped and billed directly to the customer by the manufacturer, although in some isolated instances, the shipment is to the agent for redelivery to the customer. While shipments are made by common carrier, F.O.B. out of state, the agreements require the manufacturer to install the equipment at the customer's location and the manufacturer completes its installation obligation by contracting with third parties to install the equipment.

The manufacturer is obligated to collect use tax on its sales to California customers since it is engaged in business in this state pursuant to section 6203. The manufacturer is not liable for sales tax on its retail sales in California. This is because the manufacturer itself (as distinct from its agent) has no place of business in California. Regulation 1620 provides in summary that the sales tax applies only if there is both a sale which occurs in California and some involvement in the sale by a place of business of the retailer. The latter condition is not met when the manufacturer's installation agent, rather than the manufacturer itself, completes the delivery of the equipment in California by installing the equipment at the buyer's location. 5/21/85.

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325.0055 **Installation by Out-of-State Seller.** A purchase order for tangible personal property was sent by Company A from California direct to Company B located out of state. B has no California branch or office. Delivery in California was made via common carrier from out of state with freight prepaid FOB destination. Installation in California was performed by B's representative from an out-of-state facility.

Under Regulation 1620, the sales tax can not apply. It makes no difference whether the terms of the delivery are FOB destination or whether the California installation is performed by the seller's out-of-state representatives. Use tax, rather than sales tax, applies to the purchase price in this transaction. 10/20/88.

325.0057 **Installation by Out of State-Vendor.** A vendor performs repairs on property it sells, but does not do so pursuant to maintenance contracts or warranties. Rather, it makes a charge for repairs, separately stating the charge for parts it furnishes. The vendor keeps the repair parts at its out-of-state plant. The repair parts are sent to California by one of two methods: (1) repair parts to replace parts which break frequently are sent by the vendor from its out-of-state plant to its in-state employees prior to knowing who the ultimate customer will be, or; (2) repair parts to replace parts which break infrequently are sent by the vendor from its out-of-state plant to its in-state employees only after an initial field visit to the ultimate customer. In both of these methods of delivery, the field service employee personally hand carries the repair parts to the customer's location at the time the repair is made. The vendor is making a retail sale of the repair parts inside this state since delivery of the part is made by an in-state field employee of the vendor. Since the in-state employee operates from a location of the vendor in California, sales tax applies to the separately stated charges for the repair parts. 5/20/96.

325.0060 **Installation of Special Equipment.** An out-of-state retailer places an order for a truck which order is filled by the manufacturer's division in California, who in turn delivers the truck to another firm in California for the purpose of installing special equipment. If the out-of-state retailer's contract was to sell a completely equipped truck and he made the agreement for installation of the special equipment in California and also arranged to transport the vehicle to his customer out-of-state, it is an exempt sale for resale. If, however, his customer made the installation contract, delivery to the installer in California would amount to delivery to a consumer and a taxable retail sale would result. 1/7/55.

325.0080 **Local Participation.** In interstate transactions, unless sales are made with the participation of a local office or place of business, the sales are made in interstate commerce and the use tax is the applicable tax. If the seller maintains a place of business in this state, he would be liable for collection of the use tax. 3/31/55.

325.0080.400 **Motorhome and Auto Tow Tractors.** A couple, who are California residents, purchases a motorhome and auto tow trailer in Oregon. They drive both units to California to clean and pack the vehicle. Within one or two weeks, they drive the units outside the state to visit relatives during the following

five months. If the motorhome was driven empty into California for cleaning, packing, and outfitting, its first functional use was in California and its use is subject to use tax. However, if the motorhome was used to tow the auto tow-trailer to California, then the first use was outside of California. Under these circumstances, assuming the motorhome is used outside of California for five of the following six months, its use would not be subject to California use tax.

Likewise, the auto tow trailer would be subject to tax if it did not carry a car back to California since the first functional use would be in California. However, if it did carry an auto then its use likewise would not be subject to tax if its use was outside California for five of the six months after its first entry into California.

The fact that the auto is registered in California for insurance purposes would not affect the analysis. 4/29/97.

325.0081 **Out-of-State Delivery of Motorhome.** A California motorhome dealer will make a sale of a motorhome to a California resident who will take delivery out of state. The purchaser will functionally use the motorhome for a period of not less than 90 days outside of California. The vehicle may be registered in California.

Section 6247 creates a presumption as to the retailer that property delivered outside of California to a purchaser known to be a resident of California is regarded as having been purchased for use in California. The section 6247 presumption may be controverted by a statement in writing, signed by the purchaser, and retained by the dealer that the property was purchased for use outside of California. If the dealer takes a section 6247 statement in good faith, the dealer is no longer responsible for collecting use tax even if the purchaser actually purchased the motorhome for use in California. Under such circumstances, the purchaser, of course, would be liable for the applicable use tax. In order to regard the section 6247 statement as being taken in good faith, the dealer must believe that the motorhome is being purchased for use outside this state and be without knowledge of any facts which would put a reasonable prudent business under similar circumstances on notice that the motorhome is being purchased for use in this state. [See Cal. U. Com Code section 1201(19).] If the dealer obtains a section 6247 statement from a purchaser who requests that the dealer register the vehicle in California, and it is subsequently determined that the purchaser purchased the motorhome for use in California, the dealer's good faith acceptance of the section 6247 statement may be questioned.

If the motorhome is functionally used outside of California in excess of 90 days from the date of purchase prior to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, Regulation 1620(e)(2) provides that such use will be accepted as proof of an intent that the motorhome was not purchased for use in California. Therefore, under these circumstances, use tax would not apply. This analysis would apply regardless of whether the motorhome is registered in California. 8/12/96.

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325.0082 **Out-of-State Lease of Vessel.** A cruise company purchases a vessel from an out-of-state ship builder. The cruise company enters into a bareboat charter agreement with the shipbuilder, whereby the cruise company leases the vessel back to the shipbuilder for at least 91 days. The cruise company would receive a percentage of the revenues generated by the use of the vessel during the charter period.

The shipbuilder will host no charge parties to exhibit the vessel to generate future business for both the shipbuilder and the cruise company. Profit making charters would also be made. All of this use will occur outside California.

After expiration of the charter, the vessel would be brought to California for use in California waters by the cruise company.

The vessel is mobile transportation equipment. The use by the lessee (the shipbuilder) is therefore attributed to the lessor (the cruise company). Since the vessel was used outside California for more than 90 days before entering California, it is presumed that it was not purchased for use in California and no tax applies. 8/30/91.

325.0083 **Out-of-State Repairs.** A company contracts with California hospitals to repair their medical equipment. The company's independent sales representatives pack up the equipment and send it to one of the company's out-of-state vendors to perform repairs. After repair, the equipment is shipped back to the hospitals by common carrier.

The repair parts were sold outside the state; thus sales tax does not apply. However, the company has independent sales representatives in California, and is thus a retailer engaged in business in this state. It is required to collect use tax on repair parts from its customers and to remit the tax to the Board. 2/10/95.

325.0088 **Place of Sale—Sales v. Use Tax.** In determining the place of sale, you must first determine if there is a title clause. Unless such a title clause passes title sooner, title passes and the sale occurs when the seller completes its duties with respect to physical delivery of the property (Cal UCC 2401.) When delivery is by the seller's own facilities, the seller completes its duties with respect to physical delivery upon tender of the property to the purchaser. When delivery is by common carrier and the contract states "F.O.B. destination," the seller does not complete its duties with respect to physical delivery until the property is delivered at destination. Under such a contract, the sale occurs at destination unless the contract specifically states that title passes sooner. If the contract does not have an F.O.B. destination provision and delivery is by common carrier, the sale occurs upon the seller's tender of the property to the common carrier, unless the contract specifically passes title sooner.

If the sale takes place out of state, the only tax that can apply is use tax and the participation of an in-state sales office is irrelevant. On goods shipped to California by common carrier F.O.B. Destination (with no specific title passage clause), the sale takes place in California. Thus, the question of the participation by an in-state sales office needs to be resolved to determine if sales or use tax applies. 9/18/95.

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325.0089 **Platinum Catalyst—Out-of-State Use.** When a refiner uses fresh platinum catalyst at one of its out-of-state refineries for six months and then ships this catalyst to a California refinery where it will be used for two more years, the catalyst and platinum content are not subject to use tax even if it was the refiner's intention to follow this procedure when it first purchased the catalyst.

If the situation was reversed and the fresh catalyst was first used in California for six months and then shipped to an out-of-state refinery where it would be used for two more years, the tax would apply when the refiner first purchased the catalyst. 4/12/71.

325.0090 **Promotional Material.** An out-of-state printer/mailer asked for application of tax to the following transactions.

(1) Printer/mailer produces and mails in Pennsylvania direct mail promotional material for customer based on customer's mailing list at no cost to the recipients. Printer/mailer and customer both have nexus in California.

Title passes at the time promotional material is deposited in the mail in Pennsylvania. Accordingly, use of the property by the customer occurs outside of California, and the use tax does not apply.

(2) Printer produces catalog insert pieces in Pennsylvania for customer and drop ships them via common carrier to a bindery/mailing house in California contracted for by customer. The printer has nexus in California. The printed pieces will be incorporated into a catalog by the bindery/mailing house and will be mailed based on customer's mailing list at no cost to the ultimate recipients. Some pieces will be mailed to recipients within California; others will be mailed to recipients outside of California.

Customer is considered to be making use of the catalog insert pieces in California by sending the printed material to recipients. Use tax applies to such use of the property including the material shipped to recipients outside of California. It is immaterial whether or not the customer is engaged in business in California. However, if the catalog qualifies as a printed sales message and meets the requirements of Sales and Use Tax Regulation 1541.5(b)(1)(2)(3), the transaction would be exempt from sales and use tax.

(3) Printer/mailer produces in Pennsylvania direct mail promotional material for customer and ships material via common carrier to a post office in California for mailing to recipients both within California and out of California. Printer/mailer has nexus in California and customer may or may not have nexus in California.

Answer is the same as response to transaction 2 above. 11/21/91.

325.0094 **Purchase of Motor Home.** A California resident purchased a large motor home with about 10,000 miles from a dealer in Oregon on or about April 15, 1996. Since the purchase, the motor home has been stored in Oregon when not in use. The California resident claims he has taken two trips to date in the motor home, one for 1,500 miles in May 1996 and the other for 1,200 miles in June 1996, all outside California. He plans to use the vehicle in August 1996 to go to Canada, expects to put another 2,500 miles on it, and then bring it into

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California. The vehicle carries enough fuel for more than 2,000 miles so that owner claims he cannot provide fuel or maintenance receipts establishing the date or itinerary of any of the use.

It is necessary for a purchaser who claims that he did not purchase the property for use in this State to overcome the presumption in section 6246 that it was purchased for use in California. It is difficult for a purchaser to overcome the presumption that the vehicle was purchased for use in California solely upon declarations and odometer readings. It is reasonable to expect that the purchaser would have some documentation to support his contention that he used the vehicle outside California for more than 90 days. The type of documents that could be used to support the purchaser's contention are receipts for purchases made out of state for groceries to provision the vehicle, dining out and entertainment receipts or ticket stubs from movies, receipts for maintenance such as oil changes or other repairs to the vehicle, receipts for registration at parks or other facilities used during travel, receipts for dumping of waste, and telephone bills showing calls made from places outside the State. 9/27/96.

325.0100 **Rail Freight Cars.** Section 6368.5 of the Sales and Use Tax Law exempts from sales and use taxes any leased rail freight cars which are used chiefly in interstate transportation, whether the lessee is a shipper or a railroad, and without regard to when the car first enters the state of California, or the number of days the car spends in California. 3/12/64.

325.0100.500 **Rail Freight Cars—Repair Parts.** Parts installed onto rail freight cars outside California and first entering California as part of the rail freight cars are regarded as rail freight cars for purposes of the section 6368.5 exemption. (*Pan American World Airways, Inc.* v. *State Board of Equalization* (1955) 131 Cal.App.2d 638). As such, no tax applies to the use of such parts in California if the rail freight cars are thereafter used in interstate or foreign commerce. However, tax does apply with respect to parts first entering California as parts (rather than already installed onto rail freight cars), even though they are thereafter installed onto rail freight cars, because section 6368.5 does not exempt the sale or use of parts. 8/30/96.

325.0103 **Repair Is Use.** A California resident purchased and took possession of a vehicle in Europe. He used the vehicle in Europe for about a month at which time the vehicle was involved in an accident and was damaged. He returned to California about 60 days after he purchased the vehicle. Repairs to the vehicle took an additional 60 days. The vehicle was then shipped to the buyer in California.

Repair of the vehicle was an exercise of a right of ownership by the buyer. In determining whether the vehicle was used outside California for 90 days or more, the time required for repair should be included. 12/8/87.

325.0104 **Repairman as Shipper.** A purchaser of machinery hired a person to modify the machine located at the seller's premises. After modification, the person shipped the modified machine by common carrier to the purchaser at an out-of-state location. In this situation, sales tax applies since the machine was

delivered to the purchaser's agent in this state as set forth under Regulation 1620(a)(3)(a). Once the person entered the seller's premises for the purpose of performing the modification, it took delivery of the machine as an agent for the purchaser. 6/14/91.

325.0105 **Sale on Approval.** For purposes of applying Regulation 1620, a contract to sell on approval is equivalent to a ''contract of sale'' when the buyer is located inside the state and the seller is located outside the state. Sales tax rather than use tax would apply only if there is participation by a representative of the buyer located in the state. 6/23/77.

325.0106 **Sales on Approval.** A taxpayer receives property in California from an out-of-state retailer pursuant to a sale-on-approval arrangement. The seller has no office or personnel located in California. The taxpayer examines the property and decides to buy the property. The property is located in California. Thus, the sale takes place in California. Nevertheless, use tax rather than sales tax applies because there is no participation in the transaction by a local office of the seller. 5/20/94.

325.0107 **Sale on Approval Transaction.** Sale on approval transactions are properly subject to use tax under Regulation 1620(a)(2)(B) where there is no participation by any branch, office, outlet, or other place of business, or any agent having a connection with such branch, office, outlet, or other place of business. While sales tax may be applied to sales of goods after they ''have come to rest'' in this state, a transaction retains its characteristics as an interstate transaction even though title may pass to the purchaser in this state, if the title transfer is an integral part of a transaction involving an order sent by the purchaser directly to a retailer at a point outside this state and involving direct shipment to the purchaser across a state boundary. In other words, ''the goods that have come to rest'' in this state are not within the constitutional meaning of that phase when the title transfer to be taxed is part of a continuous transaction involving interstate transmission of orders and transit of goods. 5/13/77.

325.0108 **Sale of Tanker Trucks to Out-of-State Customer.** A taxpayer is a manufacturer and retailer of tanker trucks. The taxpayer acquires a truck cab and chassis from a truck manufacturer and then acquires a tank from a tank manufacturer. The taxpayer installs the tank and accessories onto the truck chassis. After completion of manufacture, the taxpayer sells the complete truck package to California customers and to out-of-state customers. Currently, when the taxpayer sells a tanker truck to an out-of-state customer, the taxpayer delivers the truck to the customer outside California. However, the taxpayer would like to begin delivering the trucks to its out-of-state customers at its California business location. The taxpayer asks, assuming its customers meet the documentation and time requirements of section 6388 and 6388.5, whether these transactions would qualify for exemption from tax under these provisions.

Since section 6388.5 only applies to trailers and semi-trailers, the exemption provided by this section is not available with respect to tanker trucks constituting a single unit. [Vehicle Code section 410 (motor truck).]

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The exemption provided by section 6388 is applicable to the sale of a new or remanufactured vehicles which have an unladen weight of 6,000 pounds or more. This section applies to trucks. However, one of the conditions for the application of this exemption is that the vehicle is purchased from a dealer outside California. Since the taxpayer is a California dealer, the sales also would not qualify for the section 6388 exemption. 2/6/92.

325.0110 **Sales Tax v. Use Tax.** Company A mails its purchase order to Company B which is located in New Jersey. The property is shipped to California by common carrier from Illinois. Payment is remitted to Company B's California office.

Since title passed upon delivery to the carrier in Illinois, the transaction is not subject to sales tax, but rather use tax. The fact that payment was made to the California office is irrelevant under these circumstances. 8/23/91.

325.0115 **Samples—Carpet.** An out-of-state carpet manufacturer makes a taxable use of carpet samples in California when the manufacturer addresses the samples to retailers but ships the samples to the manufacturer's California employees who then forward the samples at no charge to the retailers.

Until the employees in California forward the samples to the retailers, the manufacturer has not relinquished ownership of the samples. Therefore, the taxable use, i.e., the giving of the samples to the retailers, occurs in California. 8/17/87.

325.0120 **Servicing of Machines by Agent of Branch Office of Seller.** Where the ''sale'' occurs outside the state the sales tax is inapplicable regardless of whether there is participation by the local office or branch of the seller. Where, however, the sale occurs in the state the sales tax applies where there is participation in the sale by the local branch or office of the seller.

The solicitation of orders by a representative of the local or branch office of the seller or the servicing of machines by representatives from the local or branch office constitute ''participation'' sufficient to subject the transaction to the sales tax, even though the actual order was sent directly to the retailer at a point outside this state. These activities constitute sufficient local activity to bring the sale within the scope of the sales tax under the rule of *Norton Company* v. *Department of Revenue of State of Illinois,* 340 U.S. 534. Although that decision was not specific as to the extent of local participation, the subsequent case of *B. F. Goodrich Company* v. *State of Washington,* decided by the Washington Supreme Court on May 15, 1951, is indicative that the activities in question are sufficient to cause the sales tax to be applicable. In that case the opinion reads in part as follows:

''The only sales involved in the present case about which there might be some doubt under the Norton Co. decision, are those in Class C. It will be recalled that these sales are not channelled through the local office. Orders are sent to Portland and filled there, the merchandise being shipped directly to the purchasers. However, it appears that, if no dealer franchise or credit approval has been given the purchasers, the orders are referred to the Washington division office in order

that these may be granted or denied. Appellant's argument that, while a franchise and credit approval are conditions precedent to the purchase and sale of merchandise, they are unrelated to the actual purchase of merchandise by the buyer, or to the sale and delivery by the seller, is not without force. Nevertheless, this tax is 'paid for the act or privilege of engaging in business activities in Washington.' We only interpret the Norton Co. case as holding that such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do. It is, of course, conceded that a state has the right to tax the privilege of doing local business, and, here, the Washington office unquestionably performs a service essential to the completion of the sales the proceeds of which the state seeks to tax. We are in agreement with respondent that this activity is sufficient to tie the Class C sales to the Washington business of the B. F. Goodrich Company, and that Washington may consequently reach the proceeds therefrom through this tax.''

Accordingly, solicitation of orders as well as the servicing of machines after delivery constitute activities sufficient to prevent the tax from being held inapplicable upon constitutional grounds. 4/21/52.

325.0130 **Software Delivered in California.** An out-of-state taxpayer who develops and sells clinical medical software entered into a license agreement with a medical institution (customer) on June 29, 1990, whereby the customer acquired the right to use certain computer software at ten of its clinical reference laboratory sites located throughout the country. The sales agreement tentatively identified eight of the ten sites. However, the customer retained the right to substitute equivalent size facilities for any site. The agreement identified the customer's Texas laboratory as being the first laboratory site for installation of the software. The sales agreement permitted the customer to make copies of the software to fulfill the ten site requirement, eliminating the need for the taxpayer to ship more than one copy of the tape containing the software. The agreement did not specify a purchase price for each site. The agreement merely listed all of the software licensed for ten sites and indicated a total price of $2,500,000. Terms for payment linked payment to the earlier of the conversion of various sites or specified dates. Full payment was due by December 15, 1992, or after the conversion on the seventh site.

On June 20 and July 6, 1990, the taxpayer shipped tapes containing the licensed software to the customer's California headquarters. The software was shipped prior to the contract signing due to the short time frame contemplated for the ten-site installation.

The customer's employees created an appropriate environment on computer hardware located at the California headquarters and installed the licensed software. The software was also tested to insure that it was functioning correctly. In August 1990, a copy of the software and database was transferred from the customer's California headquarters to the Texas site where it was installed and the database completed. Although the software media was delivered in June and July of 1990, the first invoice was not issued until November 1990.

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The software has remained installed at the California headquarters since the date of the original installation in July 1990. The headquarters was also a licensed site.

Under these facts, the customer purchased tangible personal property from a retailer for use in this state. When the customer installed the software in its computer in California, it made a use of the software in this state. The sales agreement permitted the customer to make the copy of the software in California, and the customer did, in fact, make the copies in this state rather than the taxpayer shipping copies to other sites from its out-of-state location. Under these circumstances, use tax applied to customer's use of the software in this state measured by the total sales price of $2,500,000. As a retailer engaged in business in California, taxpayer was required to collect the use tax from the customer. 3/29/94.

325.0140 **Storage in State of Property Usable Only at an Out-of-State Point.** A taxpayer with facilities both inside and outside California purchased custom equipment outside the state for use in a facility being constructed outside California. Construction of the facility was delayed such that the fabrication of the custom equipment was completed before the facility was prepared to receive it. Accordingly, the equipment was shipped to the taxpayer in California for storage pending delivery for installation at the out-of-state facility. It was in fact ultimately shipped to the out-of-state facility and permanently installed there. The equipment was specifically designed and intended for use at the out-of-state facility. The taxpayer had no facility inside California that could utilize the equipment or that was sufficiently compatible with the equipment as to permit testing of the equipment or training of personnel to operate the equipment.

The storage of the equipment is excluded from the use tax under section 6009.1 of the Revenue and Taxation Code. 9/2/76.

325.0160 **Testing as Only Use in State.** An out-of-state bank has subsidiaries in California and other states. It institutes a plan to upgrade the computer systems used in the branches of all of its subsidiaries. It purchases the equipment which it will resell to the subsidiaries. It arranges for all of the equipment which it buys for the upgrade plan to be shipped to a service center in California which is owned and operated by another party. The other party unpacks the hardware, loads software and arranges packages as they will be used at specific branches in order to test the system. Once tested, equipment is repackaged by the other party and shipped at the bank's direction to specific branches inside and outside California. The equipment will not be functionally used until it is installed at the individual branch.

Tax will apply to the equipment sold to and used by California branches. Tax does not apply to equipment sold and shipped to and used by out-of-state branches. 2/24/94.

325.0165 **Time Aircraft Is Refurbished Out of State.** A California resident accepted delivery of and took title to an aircraft out of state. The aircraft, carrying a passenger, was flown into California. The aircraft was subsequently delivered to a company in Florida to complete a major refurbishing of the aircraft.

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At the time the aircraft was purchased, a jet engine was also purchased. At the time of purchase, the jet engine was located out of state where it underwent maintenance. After the maintenance was completed, the jet engine was shipped to Florida and attached to the aircraft.

Since the aircraft was first functionally used outside California and entered California within 90 days of purchase, the principal use test applies to determine if the aircraft was purchased for use in California. The time the aircraft was being refurbished out of state is considered storage or use outside of California, (Section 6008). Therefore, if the time for refurbishment added to any other storage and/or use taking place outside of California equals or exceeds one-half of the six-month test period immediately following the aircraft's initial entry into California, use tax will not be due on the purchase price of the aircraft.

With respect to the jet engine, if the time of repairs and attachment was in excess of 90 days from the date of purchase to the date of entry in California, it will be presumed that the jet engine was not purchased for use in California. On the other hand, the time which the engine was shipped to California or stored for shipment is not counted towards prior out-of-state use in excess of 90 days. If the time of actual use outside California (i.e., repairs) exceeded 90 days, excluding the time of shipment and storage for shipment to California, use tax will not be due on the purchase price of the jet engine. 5/15/95.

325.0167 **Title Passage in State.** An out-of-state vendor ships property to California customers by common carrier with title passing during the interstate delivery or at the destination. The vendor has no presence in this state. Since sales tax cannot apply unless there is some participation in the transaction by a California office or agent of the vendor pursuant to Regulation 1620(a)(2), the California sales tax is inapplicable, but the use tax is applicable. 3/10/75.

325.0168 **Title Passing to the Purchaser at an Out-of-State Point.** A manufacturer has a manufacturing facility located out of state and a sales/distribution warehouse in California. It manufactured equipment to the customer's order at its out-of-state facility and shipped the equipment to the manufacturer's California warehouse for storage. When equipment is needed at the wellsite, which is located in federal waters outside California, either the customer will pick up the equipment at the warehouse, or the manufacturer will deliver it to the wellsite by its facilities or by common carrier.

The manufacturer proposes to include a title clause in its acknowledgment to the customer's purchase order. The clause will notify the customer that title will pass to the customer at the out-of-state manufacturing point so that the transaction will not be subject to the sales tax as set forth under Regulation 1620(a)(1).

To be effective, the title clause must be part of the sale contract between the manufacturer and the customer. A unilateral title clause is not acceptable. A recommended procedure is that the title clause be included in the customer's purchase order and acknowledged by the manufacturer before the equipment is delivered in California. If the customer submits a verbal order, or a written order

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which does not include a title clause, the manufacturer may include the title clause in the acknowledgment of the order. In that case, however, the manufacturer should ensure that the customer accepts the title clause by signing a copy of the acknowledgment, and returning the signed copy to the manufacturer, before the equipment is delivered in California.

The manufacturer should also be careful to avoid any actions inconsistent with the prior passage of title to the customer. For example, any time the property is shipped, the bill of lading should show the customer as the shipper, or should at least indicate that the manufacturer is acting as the shipper on behalf of the customer. Similarly, any insurance forms or other document relating to the storage in California should not state or imply that the manufacturer has title in the equipment.

If the sale contract includes a clause under which title in the equipment passes to the customer outside California, then sales tax will not apply, with one limited exception. The exception is where the contract is not performed as written. For example, if the equipment is delivered to the California warehouse, but the customer rejects or otherwise refuses to receive or retain the equipment, title in the property will revert to the manufacturer by operation of law under California Commercial Code section 2401. If the manufacturer then cures the defect and delivers the equipment to the customer in California, title will pass in this state and sales tax will apply.

Since the equipment is to be used in federal waters outside California, and not for storage use or other consumption in this state, the equipment will not be subject to the use tax pursuant to the exclusion provided by section 6009.1. The manufacturer will be relieved from the duty to collect the use tax if an appropriate certificate is received in good faith from the customer. This certificate must be in writing and must be signed by the customer or his authorized representative before or at the time of physical delivery to the customer. It must state that the equipment is purchased for use solely outside California at a named point or points outside this state. 9/3/85.

325.0170 **Turbine Engine Repair.** Company A's repair facility, located outside of California, is primarily engaged in the repair and overhaul of turbine engines for commercial airlines. Company B's repair facilities located both inside and outside California, is engaged in the same business primarily for charter and private business aircraft. An engine to be repaired is removed from the aircraft at its regular maintenance location and shipped to Company A's or B's repair facilities. When the repairs are completed, the engine is shipped FOB the shipping point to Company A's customer or to Company B's customer in California or another state. The application of sales and use tax to the following various repairs was requested:

(1) Does California law provide a sales and use tax exemption for repairs of general aviation and business aircraft or for commercial aircraft.

The Revenue and Taxation Code provides an exemption for certain sales of aircraft. However, these exemptions are for aircraft and not aircraft parts. Parts

used in the repair of the aircraft engines that are sent to California do not qualify for any exemption and are subject to tax.

(2) Special Process—A flat rate charge for labor, materials, an overhead used in the performance of special functions such as x-rays for internal engine cracks or plasma spray. The billings for special process activities are lump sum.

Assuming that the materials used in the performance of the special process are actually consumed by the repairer during the special process and are not furnished and installed on the engine, no tax applies to the charge for the labor, and the repairer is regarded as consuming the property used in performing this special process.

(3) A handling fee charged to the customer when the customer provides parts for either Company A or B to use in a repair service.

Assuming that neither Company A or B performs any fabrication labor, but merely installs the parts, the handling fee is not subject to tax.

(4) A fee, calculated as a percentage of the part's list price, to expedite the customer's work, is paid by customers who use parts from Company A or B's rotable inventory, which is an inventory of reconditioned parts.

When property is sold, or purchased for use, in California, tax applies to this fee.

(5) A fee for the use of Company A or B's test cell which is a special facility used to test engines against the original manufacturer's standards for power, vibration, and heat. The test cell is located and used outside California for Company A and inside California for Company B.

When either company repairs an engine and then charges a separate fee for testing that repaired engine, no sales or use tax applies to the charge for testing regardless of whether the testing is conducted inside or outside California.

(6) A charge passed through to the customer for fuel and oil used in testing customer engines. All fuel is consumed at the repair facility or removed from the engine prior to shipment to the customer. The charge is for costs plus a mark-up by product line of approximately 5–25%.

The repairer is the consumer of this fuel and oil. With respect to fuel an oil consumed at the California facilities, sales tax applies to the sale of the fuel and oil to the repairer or use tax applies to the repairers use of the fuel in California measured by the purchase price. The fact that the overhead expense of the fuel and oil is passed on as an itemized charge does not change the repairer's status as a consumer unless the contract specifically provides that title passes to the property prior to use by the repairer. 12/20/91; 8/20/92.

325.0180 **Unused Property Returned to California Company from Out of State.** A California company provides sales invoices with various advertisements printed on the bottom to out-of-state recipients free of charge. The invoices are shipped by a California printer directly to the out-of-state recipients. These invoices must be used by recipients during a specific period as the

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advertisements are valid for a limited time period and contain an expiration date. The recipients are required to return all unused invoices to the California company.

Tax applies to the sales price of the invoices returned to the California company from the out-of-state recipients. The California company's use for purposes such as tracking the number of unused invoices, recycling, destruction, modification and reissuance, etc. is considered functional use in this state since the returned invoices are used for a purpose suitable for outdated sales invoices. The 90-day rule provided in Regulation 1620 applies where there is a first functional use of the property outside California. In this case, the returned invoices are never functionally used outside California and the 90-day rule does not apply. 2/23/98. (M99–2).

325.0185 **Use or Storage for Purposes of the Six-Month Test.** An aircraft purchased from a retailer outside California was first functionally used outside this state and brought into California within 90 days after its purchase. To determine whether the property was used or stored outside California one-half or more of the time during the six-month period immediately following its entry into this state, both the use and the storage of the property during that six-month period are important and relevant. During this six-month test period, the aircraft could be both stored and used or only stored or only used. For this test, the particular type of use or storage, such as flight time or repair time or hangar time, is irrelevant. The type of use or storage may become relevant if the aircraft fails the test to determine whether it was purchased for use in California, and the purchaser then seeks an exemption from use tax under sections 6366 or 6366.1. 9/9/99. (2000–2).

325.0190 **Use Tax Exclusion.** An out-of-state retailer, engaged in business in California, sold aircraft parts which were delivered to airline common carriers in California. Since the sales occurred outside California, use tax on the parts is due, unless an exemption or exclusion from tax applies. In this case, the seller accepted exemption certificates from the carriers, under Regulation 1621, and did not collect the use tax on the parts. However, those certificates are valid only with respect to the exemption from the sales tax as provided by section 6385. Therefore, since the seller did not take a certificate, from the carriers, claiming the storage and use exclusion provided by section 6009.1, it still owes the use tax it was required to collect. This applies unless it establishes that the parts' presence in California is excluded from "use" as provided by section 6009.1. 9/26/89.

325.0192 **Use Tax Exclusion—Intermodal Cargo Containers' Component Parts.** The exclusion from use tax provided for the use of intermodal cargo containers (ICCs) by Regulation 1620(b)(2)(B)2. does not apply to the use of component parts of such containers when the component parts are first functionally used in this State. Generators are purchased outside California and delivered to the purchaser at a facility in California. The generators are

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temporarily attached to the ICCs at the point of delivery in California and then the generators are first functionally used. Even though the generators, once installed, are considered as component parts of the ICCs, the use of the generators cannot qualify for exemption because the first functional use of the generators was in California. 2/28/02.

325.0193 **Use Tax—Investment.** A California resident purchased unfinished diamonds for investment purposes from an out-of-state retailer. The diamonds were sent to a trust company located in another state. The purchaser had ownership, dominion, or control over the diamonds. The diamonds were held by the trust company for a period of over 90 days before being shipped to the California purchaser.

Since the property was used/stored outside the state for more than ninety days, use tax does not apply. 12/24/87.

325.0198 **Vessel Purchased Out of State.** A taxpayer is purchasing a yacht from a manufacturer in the State of Florida. The taxpayer will pay for the yacht in Florida, and the seller will deliver the yacht to the taxpayer in Florida. After the purchase, the taxpayer may use the yacht in Florida for a short period of time, possibly as little as 14–21 days. The taxpayer will then have the vessel broken down in Florida and shipped by a licensed carrier to California. Upon arrival in California, a third party will, for a fee paid by the taxpayer, reassemble the yacht. Upon that reassembly, the taxpayer will have the yacht placed into the ocean at San Diego, California, and the yacht will then be voyaged to Mexico for a minimum of four to five months of continuous usage in Mexican territorial waters.

Since the yacht enters California within 90 days of purchase, it is presumed to have been purchased for use in California. Tax applies unless the taxpayer overcomes that presumption. The presumption can be overcome by showing that the vessel will be used outside of California one-half or more of the time during the six-month period immediately following its entry into California. Assuming that the yacht will be in California no more than one month prior to departing California waters for Mexico, the yacht will be used outside California for at least four months during the six months immediately following its entry into California. As such, the taxpayer will overcome the presumption that he purchased the yacht for use in California and use tax will not apply.

On the other hand, if the taxpayer does not use the yacht in Florida and the vessel is first functionally used in California, the yacht would be considered to have been purchased for use in California and will be subject to use tax measured by the sales price of the yacht. 10/21/96.

| 325.0210 **Warranty Repairs on Aircraft—90-Day Rule.** When an aircraft's first functional use occurs outside of this state and is subsequently brought into California within 90 days after delivery solely for the purpose of having warranty repairs at an authorized factory service center, the time in California is included within the six month "principal use" test period. 6/7/91.

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325.0220 **Yacht Moved to California for Repairs.** Taxpayer purchased a yacht in South Carolina on October 28, 1994, with the intent to travel outside U.S. waters. The vessel was stored in South Carolina until it was determined that a refit was necessary to make the boat seaworthy and safe for extended sea voyages. The vessel moved to Long Beach, California for the major refit because it was in proximity to Arizona where the owner resides. The vessel arrived in California on February 7, 1995—102 days after the purchase of the vessel. On February 13,1995, the vessel suffered $45,000 in fire damage when the boat next to it burned to the waterline. The refit could not be performed and the vessel could not leave U.S. waters.

The taxpayer is required to establish that the vessel was used outside California for more than 90 days prior to its entry into California, **exclusive of time of shipment and time of storage** for shipment to California. If the vessel was not used outside California more than 90 days prior to its entry into this state, the taxpayer will be presumed to have purchased the vessel for use in this state and will owe use tax, unless the taxpayer can establish that the vessel was used or stored for one-half or more of the time during the six-month period immediately following its entry into this state (which was February 7, 1995). [See Regulation 1620 (b)(3).] In this case, the vessel was outside the state for ninety days, but there is no evidence of functional use. Lacking such evidence, it will be regarded as purchased for use in California since it was located here for one-half or more of the time during the six-month period following its entry into California. The fact that the vessel was here longer than anticipated because of the fire is not relevant in determining whether the vessel was purchased for use in California. 7/2/96.

(b) IMPORTS

325.0232 **Ad Valorem Tariffs.** An ad valorem tariff is imposed by the U.S. government on certain wood products including shakes and shingles imported from Canada. The identity of the person legally responsible for paying the tariff under federal law is the critical factor in determining whether sales or use tax applies to the amount of the tariff. The consignee of the imported wood products is the person legally responsible for payment of the tariff and the consignee is the importer of the record of the imported wood products for purposes of the tariff laws. Thus, the consignee is legally responsible for payment of the tariff to the United States. Therefore, if the seller is the consignee (importer) and passes the amount of the tariff on to the customer, it is a part of the sale price, and the amount of the tariff must be included in the taxable measure. On the other hand, if the customer is the consignee (importer), the tariff is not part of the taxable sale price.

Additionally, if a broker is involved in the transaction, the rules discussed above continue to apply. If the broker is the consignee under federal law, the taxable result would depend on whose behalf the broker acts as agent. If the broker is the seller's agent, the amount of the tariff is subject to tax. If the broker is the customer's agent, the amount of the tariff is not subject to tax. 4/8/87.

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(c) SHIPMENTS FROM CALIFORNIA TO POINTS OUTSIDE STATE

(1) GENERALLY

325.0236 **Imported Property Installed and Used in a Foreign Trade Zone.** Shipping containers equipped with refrigeration units were purchased in Japan by a California corporation. Because of anticipated difference in the voltage systems in various places of use, it was decided to equip each container with a transformer, which the corporation purchased in Belgium. The containers, without transformers, were first used to transport property from Japan to San Francisco. The transformers were shipped to the Foreign Trade Zone in San Francisco and they were delivered under supervision of U.S. Customs to the pier at which the containers were located. They were installed on the containers at that time. The containers were then loaded with cargo and were shipped to a foreign destination.

The transformers ceased to be an import at the time that they were unpacked for attachment to the shipping containers. The attachment is purely a local activity to which use tax applies. Further, section 6009.1 of the Revenue and Taxation Code does not apply because the transformers were used in a revenue producing operation in this state. 12/17/75.

325.0250 **Annual Reports.** An organization prints 14,000 annual reports in California, shipping from within this state 10,000 reports to New York and 4,000 reports to California. Assuming the 10,000 shipped to New York would be used out of California and were shipped in accordance with Regulation 1620, the sale of these reports would be exempt from the sales tax. The sales tax applies to the sale of the 4,000 reports shipped to the customer in California.

In a second situation, the organization has annual reports printed outside California and also shipped from the out-of-state point. As a retailer engaged in business in this state, the organization is required to collect the use tax from the purchaser and report and pay it to this Board. Accordingly, the organization is required to collect and report and pay use tax on the sales price of the 4,000 annual reports shipped to the purchaser in this state. 3/8/93.

325.0255 **Artwork Shipped Outside the State.** An artist sells and leases her artwork to persons who reproduce it on prints, posters and jigsaw puzzles. Typically, a copy of the original artwork in the form of a photograph or transparency is furnished to the buyer. The buyers are all located outside California. The artist is required to ship the photographs or transparencies to the buyer at the buyer's out-of-state location.

While the sale of the artwork would be taxable if delivery were made to the buyer in California, these sales are exempt sales in interstate or foreign commerce. 2/24/94.

325.0257 **"As Is, Where Is" Sales.** "As is, where is" sales are not exempt sales in interstate commerce even if a common carrier is used to transport the property out of the state. Regulation 1620 requires the shipment be "pursuant to the contract of sale." The phrase "as is, where is" implies no such contract.

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Additionally, the evidence presented indicates that the particulars as to who is to ship the property is negotiated after the sale. 8/29/75.

325.0259 **Auction Sales of Horses Ultimately Shipped Outside this State.** An auctioneer sends notices to prospective out-of-state purchasers regarding sales tax regulations together with a notice of intention to bid form to be completed by prospective purchasers of animals to be shipped in interstate commerce. The notice requires the bidder to " . . . . register his intention to bid prior to sale by completing the notice of intent to bid form. If it is desired that any horse purchased be shipped in interstate commerce such instructions must be given in writing before the sale starts. Only in this way may the transportation be made pursuant to the contract of sale." There appears to be little question that there is at least an attempt to handle the sales in such a way that they would be nontaxable as interstate sales.

It has been concluded that if the prospective out-of-state purchaser complied with the conditions of the "notice," the purchaser's submission of the written notice of intention to bid to the auctioneer/seller (fully filled out and prior to the auction/sale) is regarded as a "pre-existing agreement" between the auctioneer and the bidder which required the auctioneer to deliver the horse to a point outside the state. Since the pre-existing agreement was intended to be a term or condition of the entire contract of sale, it would appear that the auctioneer/seller was contractually obligated to provide for delivery of the horse to a point outside this state pursuant to the contract of sale. Since the customer has made a reasonable attempt to comply with the conditions of ruling 55(A)(1)(c), (Regulation 1620), these sales should be considered exempt from sales tax. 5/20/66.

325.0259.250 **Auctioneer Sales.** An auctioneer sells horses to an out-of-state buyer. Prior to purchase, the buyer furnishes the auctioneer with a document requiring that any horses purchased be shipped out of state. The bill of lading shows the buyer as the consignor and the carrier is paid by the buyer. Tax does not apply because the auctioneer is required to ship the horses out of the state as a condition of the transaction. 5/20/66; 5/24/66.

325.0260 **Aviation Gasoline** delivered in state, tax applies to sale of, even though not all is consumed in state. 6/7/50.

325.0280 **Bill of Lading.** The conditions specified for exemption do not include the requirement that the bill of lading show the vendor rather than the purchaser as the consignor. Even though the purchaser is shown as consignor, we will not regard the tax as applicable provided it can be established that the vendor, pursuant to the contract of sale, delivered the goods to a carrier forshipment to a point outside this state and the goods were so delivered and shipped. However, if the goods come into possession and control of the purchaser in this state rather than being delivered to the carrier by the seller, we would regard the tax as being applicable. 8/20/51.

325.0292 **California Base Plate with Prorate License.** In California, a vehicle (or trailer) used in interstate transportation may be "base titled" in California if

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a prorated license and registration fee is paid to those states where the vehicle is operated and those other states maintain Uniform Vehicle Registration Proration and Reciprocity agreements with California. Thus, where an interstate vehicle is base titled in California, copies of a California base plate with a prorate license (along with a complete section 6388.5 affidavit signed by the purchaser) will be accepted as part of the proof necessary to establish the exemption from sales tax set forth in section 6388.5 situations. This means that if the retailer of the trailer (unladen weight in excess of 6,000 pounds) takes, in good faith, from its customer a timely, completed, and signed section 6388.5 affidavit with written evidence of a California base plate with prorate licenses, sales tax does not apply on the retailer's sales of the trailer to the customer. 6/14/95.

325.0300 **Cargo Carried.** The sale of a truck to an out-of-state purchaser is taxable if it carries a cargo from a point in this state to the out-of-state destination, although driven by an employee of the retailer. 9/8/50.

325.0320 **Carrier.** The word ''carrier'' as used in the regulation is defined as a person or firm engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. 3/30/54.

325.0330 **Carrier.** The delivery of a yacht from a point in California to a buyer located in the state of Oregon by a skipper who was licensed by the Coast Guard constituted a tax-exempt transaction because the skipper was within the code definition of a ''contract carrier'' making a delivery to a point outside this state. 6/17/77.

325.0331 **Carrier.** A person may be regularly engaged in business as a carrier even though he does so illegally by not being registered with the Interstate Commerce Commission or any other governing agency. 6/28/83.

325.0340 **Carrier.** A trucker operating by leasing the tractor but not the trailer of his truck from an out-of-state buyer and entering a loose employment relationship in order to avoid Interstate Commerce Commission regulations is not a carrier, and sales made to the out-of-state buyer with delivery by the trucker's facilities are taxable as intrastate sales to an agent of the buyer. 9/3/64.

325.0341 **CD-ROM Manufacture.** A taxpayer enters into contracts to produce CD-ROMs for customers. It does not manufacture the disks itself, but subcontracts with out-of-state manufacturers. Molds and silk screens are used in the manufacturing process but do not become a part of the finished product. The out-of-state manufacturer charges a separately stated ''mastering fee'' for the fabrication of molds and silk screens, but it retains title to them. In turn, the taxpayer generally charges its customer a separately stated ''mastering fee.'' However, in some cases, a customer may be quoted a lump-sum price for the ''mastering fee'' and disks.

The ''mastering fee'' whether separately stated or not is part of the charge for the taxpayer's retail sale of the disks. It is immaterial that the molds or silk screens are stored or used outside the state.

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The taxpayer also fabricates films from customer furnished artwork. The films are shipped to out-of-state vendors who use them in preparing silk screens and printing plates for disk manufacture and package printing. The customers retain ownership of the films, but generally do not take possession of them. If the taxpayer delivers the films to the customer in California, tax applies to the gross receipts. If the taxpayer ships the films out of state at the customer's direction and the California customer certifies that the films will not be used in California, no tax is due. 4/10/95.

325.0341.500 **Customer Survey Program.** A taxpayer contracts with a client who manufactures and sells products to gather data regarding customers' satisfaction of the products the client sells. The client provides the taxpayer with a computer disk of the names and addresses of its customers. The taxpayer creates a customer letter and address label, prints a customer survey card and envelope, and imprints a pen with the client's logo to be enclosed in the survey mailing (in order to motivate responses). The printing and assembly is all done in California. The taxpayer mails the survey cards, pen, and personalized letter to the client's customers all over the country via the U.S. Mail. Upon receiving the responses to the survey, the taxpayer analyzes the data and provides a written report to the client summarizing this information.

Two invoices are sent to the client for this transaction. The first invoice is generated upon the mailing of the survey form, etc., and it includes charges for material and printing cost (plus a small mark up) and for out-going postage. The second invoice is generated when the taxpayer submits its written report to the client and includes the charges for the balance of the contract amount.

Sales tax does not apply to the gross receipts from the sale of pens and printed materials which, pursuant to the contract of sale, the taxpayer ships to persons outside this state by U.S. Mail provided neither the client nor its agent obtains possession of the property inside this state. Tax does apply, however, to the gross receipts the taxpayer receives from its sales to the client of printed material and pens that are shipped to the client's customers inside this state. Tax does not apply to the taxpayer's charges for postage for shipping the pens and printed material provided its charges for transportation are separately set forth in its contract of sale to the client and the amount deducted represents only the amount for shipment (and not ''handling'') of the property.

The transfer of the original unique report which is specifically collected, created, compiled, and customized for this specific client on a custom basis is incidental to the providing of a nontaxable service. The taxpayer is the consumer of any such property transferred. The taxpayer is the retailer, however, of any additional copies of the report transferred to the client. 4/10/96.

325.0342 **Space Flight Properties.** The sale of a satellite while it is in orbit to the entity for whom it was built is not subject to sales tax since the sale does not occur in California. The purchase of the component parts of the satellite are not subject to use tax since the removal of the satellite from the state by the launch vehicle is not a use of the satellite. The purchase of the component parts of the launch vehicle is subject to either sales or use tax as the functional use of the

vehicle begins at the time it is placed on the launch pad or the time the satellite is connected to it. Even if the functional use was deemed to commence at the time of blast-off, the nature of the use in California is sufficient to offset the short period of use in this state. 4/9/93.

325.0345 **Supporting Documentation Needed by Contract Carrier.** With respect to operations involving the transportation by boat of property purchased by oil companies from points in California to oil drilling locations in waters outside of California, the following persons qualify as ''carriers'' within the meaning of Section 6396 of the Revenue and Taxation Code: (1) independent boat operators, other than drilling contractors, who contract with the oil company, either directly or through a drilling contractor, to transport the property regularly for compensation and (2) boat operators who are also drilling contractors, who contract with the oil company to transport the property regularly for compensation, even though the contract may be for a lump sum, including compensation for transportation and drilling, where 15–20 percent of the total compensation is allocable to the transportation.

The following documentation is acceptable in support of the exemption under Section 6396:

(1) A blanket or individual purchase order given the vendor solely covering sales with delivery to Outer Continental Shelf locations wherein a statement is made substantially as follows:

All property purchased under this order shall be shipped by carrier to those specific locations situated in the Outer Continental Shelf beyond the territorial waters of the State of California as designated to the vendor by the purchaser. Should any property purchased hereunder not be so shipped to a location outside the State of California in the exempt manner prescribed under Section 6396 of the Revenue and Taxation Code, purchaser agrees to pay anyapplicable state and local sales or use taxes that might be imposed with respect to the purchase of such property.

(2) The vendor issues an invoice which makes reference to the blanket purchase order and indicates thereon the point at which the goods are to be delivered by the vendor and the drilling site to which the property is to be taken by the carrier.

(3) The vendor obtains a receipt, or a receipted invoice, from the carrier to whom the property is delivered. The receipt is to be retained by the vendor. 9/21/71.

325.0380 **Display Material.** Display material purchased from a California vendor and delivered to the purchaser in California for inclusion in out-of-state shipments by him are not exempt sales in interstate commerce since the exemption is only available if the delivery of the goods is to a carrier for shipment outside the state. Thus, the sale of the display material is subject to tax even though it is subsequently shipped to a point outside this state. 9/23/69.

325.0400 **Dealers in Other States—Resales.** Sales in interstate commerce to out-of-state dealers need not be supported by resale certificates if properly supported by bills of lading. 1/27/50.

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325.0410 **Delivery of Boat Outside California.** The seller of a pleasure boat agrees to have a broker deliver the boat to the purchaser outside the California waters with the purchaser aboard the boat during its trip out of state. There is no agreement to pass title before delivery and title in fact does not transfer to the purchaser before physical delivery of the boat out of state, such as would be the case if there were, e.g., a close of escrow in which the bill of sale were delivered to the purchaser before the delivery of the boat.

Even if the broker represented the seller in negotiating the sale of the boat, if the purchaser is the party who arranges with the broker to deliver the boat, the broker would be acting as the purchaser's agent or representative in taking the boat from California to a point outside of California. Accordingly, the seller's delivery of the boat in California to the broker as the purchaser's representative would be subject to tax.

If the seller hires the broker to deliver the boat and, as the seller's agent, the broker had possession and control of the boat in taking the vessel outside of California, and only gave possession or control of the boat to the purchaser outside of California, the vessel would be regarded as delivered to the purchaser outside California. This is true even if the purchaser was on board the boat on the trip from California to the out-of-state point, as long as the purchaser does nothing that could be construed as controlling the boat, e.g., steering the vessel or acting in any way other than as a mere passenger with no possession or control. 11/19/99. (2000-3).

325.0425 **Delivery of Property in State for Out-of-State Use.** A firm purchases component parts for its manufacturing equipment from a foreign manufacturer's sales office in California. The California sales office accepts the order, arranges for delivery from the foreign plant, and handles processing through customs. Title passes to the purchaser at the sales office in California. Pursuant to the purchaser's instructions, the sales office ships the property to a third party in California to incorporate into other equipment. The third party then ships the equipment to the purchaser's location outside of California for use by the purchaser outside California. Under these facts, where the sale of the property is made through the foreign manufacturer's California sales office and title passes (and thus the sale occurs) in California, the applicable tax, if any, is sales tax. Since the section 6009.1 exclusion applies only to use tax, it does not apply here. The manufacturer owes sales tax on his sales.

If title to the property passes to the firm outside California, the sales tax would not apply; rather any applicable tax would be the use tax. If the storage or use of the parts in California is for the purpose of incorporating them into equipment that will be transported outside this state for use solely outside this state, such storage or use comes within the section 6009.1 exclusion and the purchaser would not owe use tax on such storage or use. 06/19/96.

325.0428 **Documentation Supporting Out-of-State Delivery of Vessel.** When the delivery of a vessel and transfer of title is made at a point outside of California territorial waters by a California boat dealer to a California resident, the

following documentation should be retained to substantiate the out-of-state delivery and that the vessel was not purchased for use in California:

(1) The seller should prepare a bill of sale which states the terms of delivery of the vessel and transfer of title and which is signed by both the person making the delivery and the purchaser. The purchaser should sign the bill of sale at the time at which transfer takes place and note on the document the date and place of transfer.

(2) The seller should obtain and retain copies of the ship's log showing the trip.

(3) The seller should obtain and retain a statement signed under penalty of perjury by the purchaser stating that the vessel is not being purchased for use in California and that if the vessel enters California within 90 days of purchase (excluding time of shipment and storage for shipment), it will be used outside of California for more than one-half of the six-month period immediately following its entry into this state.

(4) The purchaser should keep adequate records to document the location of principal use of the vessel for the six months immediately following its entry into California after purchase, e.g., complete ship's logs of date and periods that vessel is in and out of California, receipts of payment for berthing, and any other receipts or documents supporting out-of-state use and location of vessel. 6/23/97.

325.0430 **Donations.** A person who donates property is the consumer of that property for purposes of the application of sales and use tax. Consumption occurs when title passes from the donor to the donee. Thus, if a donor transfers property to a carrier in California or places it in the mail in California, the donor has made a use of the property in California and he/she is liable for use tax if he/she had purchased the property extax under resale certificate or outside California. The destination of the property, whether in California or outside California has no significance. If delivered in California there is no exception on account of a subsequent shipment of property outside California. Conversely, if the property was shipped by common carrier from outside California or placed in the mail outside California, the donor is regarded as having consumed the property outside California. No tax is due from donees receiving and using the property in California since the donees did not purchase the property. 1/8/92.

325.0440 **Drilling Platform Beyond State Boundaries.** Sale of fuel, lubricating oils and greases, delivered to offshore drilling platform outside the boundaries of state by means of ship chartered by seller is exempt from sales tax as the property is delivered to the purchaser at a point outside the state by facilities operated by the seller. 9/1/64.

325.0450 **Electrical Components Added Before Shipment.** A taxpayer fabricated a custom metal exhibit for an out-of-state customer, which was to be shipped directly to the customer outside the state when completed. However, the customer later requested that the taxpayer ship the unit to an electrical company in California for the purpose of adding electrical components to the unit. The electrical company then shipped the unit out of state.

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Since the unit was delivered in California per customer's instructions, the sale took place in California and was subject to sales tax. 11/15/90.

325.0460 **Express Office.** Where, pursuant to contract, seller delivers property to an air express office consigned to an out-of-state destination, the requirements of the regulation are met and the sales tax does not apply. If, on the other hand, the seller delivers such property to an employee of the buyer in this state and the latter delivers the property to the express office, there is a delivery in this state and the tax applies. 8/30/56.

325.0480 **F.O.B. Sales.** A sale by a California retailer is exempt whether the f.o.b. point is within or without this state if the contract provides for out-of-state shipment, the goods are so shipped, and the retailer delivers the goods to the carrier. 12/18/52.

325.0485 **Gifts.** A California retailer sells gifts by mail order. Gifts are shipped directly to the recipients by the retailer's suppliers who are located both inside and outside California. Customers and recipients are also located both inside and outside California. Tax applies as follows:

Customer Location	*Recipient Location*	*Supplier Location*	*Applicable Tax*	*Explanation*
California	California	California	Sales Tax	Retail sale in California
California	Out of State	California	None	Sale in interstate commerce
California	California	Out of State	None	(1)
California	Out of State	Out of State	None	Property never comes into this state
Out of State	California	California	Sales Tax	Retail sale in California
Out of State	Out of State	California	None	Sale in interstate commerce
Out of State	California	Out of State	None	(1)
Out of State	Out of State	Out of State	None	Property never comes into this state

(1) Title to property would pass outside California when the supplier delivers the item to the shipper. Therefore, no sales tax would apply because the sale would not take place in California. Use tax would not apply because the purchaser would not be consuming the item in California.

The retailer is liable for sales tax if the tax applies to a particular transaction. 7/7/87.

325.0490 **Helicopter Repair.** A helicopter company that repairs helicopters, some of which are owned by out-of-state customers, raised the following questions:

In one transaction, the company contracts with a pilot, whereby the pilot agrees to fly a specified route and deliver the aircraft to the owner outside the State of California. The pilot is neither the owner of the aircraft nor an employee of the

company and also is not an employee of the aircraft owner. If the contract required delivery out-of-state in this manner, the sale would be an exempt sale in interstate commerce.

In the second type of transaction, the pilot is furnished by the aircraft owner, as permitted by the terms of the contract, and is paid by that owner. The fact that the contract provides that the pilot ''shall remain under the direction and control of the company at all times until aircraft leaves California'' does not make the delivery a ''delivery by the facilities of the seller.'' Since the pilot is hired by the aircraft owner, the delivery is not by facilities of the company. This sale would not be an exempt sale in interstate commerce. 8/14/92.

325.0493 **Imported Cargo Containers.** Importation in and of itself is not a use in interstate or foreign commerce. Therefore, new empty cargo containers were not in foreign commerce use when they were en route to California. They were ''used'' in California when they were readied and stored in stand-by awaiting cargo for an outbound trip and thereby are subject to use tax. 8/10/71.

325.0495 **Interstate Commerce.** An out-of-state consumer contracts with a California fabricator to design and construct a trade show booth. The fabricator refers the consumer to another firm to make the components of the booth, and then deliver the components to the fabricator for assembly. After assembly, the modules are shipped out of California. The charges for the work performed by the firm making the components are subject to California sales tax. The contract between the consumer and the firm did not require interstate shipment, and in fact that company did not ship anything out of state, but rather delivered it to the California fabricator of the trade show booth. The California fabricator does not qualify as a ''forwarding agent.'' 1/16/91.

325.0520 **Mailing Services.** Where a mail-order house places an order with a local printer for the printing of advertising booklets and delivery thereof is made to a mailing concern as the agent of the mail-order house, delivery is effected in California and printer's charges are subject to sales tax, irrespective of the fact that the mailing concern will subsequently mail some of such booklets out-of-state. 10/30/56.

325.0560 **Mistake.** The sales tax applies to sales of goods erroneously shipped by the seller to the customer's in-state location even though an employee of the customer who accepted delivery reshipped the goods to the customer's out-of-state location. The fact that a mistake was made is not legally sufficient to excuse payment of the sales tax on a transaction actually handled in such a manner as to be taxable under the law. 4/9/59.

325.0570 **Negative Retouching.** Charges for retouching new photographs constitutes taxable fabrication labor.

If the retouched negatives are merely shipped to an out-of-state location prior to making any use of them in this state, on behalf of the purchaser, the sale is exempt from sales tax pursuant to section 6396.

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However, if the customer's retouched negatives are used in this state to make prints, the sale of retouching is a retail sale in this state and subject to sales tax. 8/27/93.

325.0570.280 **Out-of-State Delivery to California Resident.** When property is delivered out of state to a person who is not known by the retailer to be a California resident, the seller is not required to collect use tax. 4/30/87.

325.0570.300 **Ownership and Possession Transferred Outside California.** A yacht berthed in California is to be purchased by an out-of-state corporation. The purchase, which is to be documented by the United States Coast Guard, will take place outside the offshore limits of California. The yacht will return to California for the purpose of refit, provisioning and sea trials to ensure its sea worthiness and safety for long range cruising. The period of time the yacht is in California will not exceed 90 days. Thereafter, the yacht will be involved in extensive world cruising for several years. There will be no plans to return to California.

If ownership of the yacht transfers outside the territorial limits of the state of California, neither sales tax nor use tax will apply to the purchase of the yacht based on the above facts. For sales and use tax purposes, a sale occurs at the place the property is located at the time ownership (title transfers) occurs. The parties to the agreement should retain written documentation that the sale (1) occurred outside this state, (2) the yacht was first functionally used outside this state, and (3) it was outside California one half or more the time during the first six months following its entry into California. 1/3/96.

325.0570.600 **Proof of Exemption.** A taxpayer who fails to obtain a bill of lading to support a claimed exemption for a sale in interstate or foreign commerce may establish that the exemption applies through the use of other documentation. However, the taxpayer bears the burden of proof by establishing to the satisfaction of the Board the facts that support the claim for exemption.

The setting forth of a series of assertions of facts together with a statement that unless the taxpayer hears otherwise from the Board, it will then assume the Board agrees with the assertions is not an acceptable method of meeting the burden of proof. 11/16/93.

325.0571 **Removal from State by Lessee.** An out-of-state manufacturer sells trailers to a California dealer who resells the trailers to a lessor. Immediately upon purchasing the trailers, the lessor leases them to a lessee. The lessee removes the trailers from the state within 30 days. The removal of the vehicles from the state by the lessee satisfies the removal requirement of section 6388.5 and tax will not apply to any step in the transaction if the required paperwork is furnished to the dealer. 10/1/82.

325.0571.850 **Sales by Auctioneers.** At the time of sale, the auctioneer did not have proof of a condition or requirement to ship or deliver the property to an out-of-state location. In instances where the auctioneer has a bill of lading showing the property was shipped from the auction site, or other place where the auctioneer had control of the property, directly to an out-of-state point by

common contract carrier, the documents (bill of lading) confirming the out-of-state shipment will be accepted as evidence of meeting the "pursuant to the contract of sale" requirement of Regulation 1620(a)(3)(B). 6/8/88; 5/20/96.

325.0571.870 **Sale of Computer Tapes Shipped to Oregon.** A company sells computer tapes and delivers the tapes to a California resident in Oregon. The buyer has the tapes duplicated and returns the duplicates to California for use here. The originals stay in Oregon and ultimately will be destroyed. No tax applies to the sale of the tapes. Use tax applies to the cost of blank tapes and the duplication charge on the tapes returned to California. 7/16/93.

325.0572 **Sale of Satellite.** A satellite builder agrees to build and launch a satellite and check out the functional capability on each satellite prior to passing title to the satellite. The builder subcontracts the launching to a firm who agrees to pay for the satellite if it does not achieve the prescribed orbit.

Assuming that the launching firm would take title to any satellite that fails to achieve the proper orbit, the sale by the builder is an exempt sale since it does not occur in California, regardless of the satellite's location in orbit at the time title passes. Title passes while the satellite is in orbit to either the original customer or the launching firm. 11/7/91.

325.0574 **Section 6247 Statement Not Taken in a Timely Manner.** A section 6247 statement that is not taken timely does not automatically overcome the section 6247 presumption that the retailer sold the property for use in California. A retailer who does not take a section 6247 statement at the time of sale is responsible to collect the use tax. Once the time for the retailer to have collected the use tax has passed, the section 6247 statement can no longer be considered timely and will not protect the retailer from its debt for having failed to collect and remit use tax, unless the Board concludes that the claim that the property was not purchased for use in California is accurate. That is, such a late statement is equivalent to an XYZ letter trying to establish a sale was for resale. 9/12/97. (M98–3).

325.0575 **Shipments of Warehoused Merchandise.** Taxpayer has offices in Sonoma and Contra Costa Counties. A customer located in Santa Clara County sends a purchase order for products which contain its logo to the taxpayer. Taxpayer bills the customer and holds the goods in its Sonoma County warehouse. At customer's direction, taxpayer sends the products to customer's offices located throughout the world. Once a month the customer is billed for fulfillment and shipping costs. The products shipped are intended as gifts to new employees.

Assuming that title passed to customer upon delivery to the taxpayer's Sonoma County warehouse, sales tax would apply to the products purchased unless the contract specifically required the property to be shipped outside California. Since shipments are made based on future instructions, it appears that the contract does not require shipment outside of California or to any other county. Consequently, the tax rate in Sonoma County (including the ¾ percent district tax) is the applicable rate since subsequent shipments are not made pursuant to the contract

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of sale. However, shipments to other counties are also subject to the destination county's district tax (if any). Since taxpayer ships the property to the customer in the destination county, and the customer makes the gift in that county, the use occurs in the destination county.

Taxpayer is required to collect the district tax in any district in which it is engaged in business (e.g., sales persons operating in the destination county such as in its Contra Costa County office would be required to collect the BART District Tax and two Contra Costa transit authority taxes). Credit for the Sonoma County district tax is applicable against another district tax when the taxpayer is required to collect. Also, the purchaser is entitled to a credit against and district use tax, not required to be collected by the seller, for the district sales tax reimbursement paid to the seller. (See Regulation 1823.) 1/13/93.

325.0578 **Testing by Purchaser with Title Passage.** The temporary transfer of a mold to the purchaser or to an extruder hired by the purchaser for testing purposes in itself does not necessarily disqualify the transaction from qualifying as an interstate sale or an export sale. Neither is the passage of title to the purchaser in this state fatal to the exemptions.

When the mold maker (seller) delivers the mold to an export packer tax does not apply.

When the extruder delivers the mold to an export packer, tax applies because the delivery is to the purchaser's representative (extruder) in this state, notwithstanding that the purchaser's representative subsequently delivers it to an export packer for delivery.

When the mold is returned by the extruder to the mold maker and then it is shipped by the mold maker pursuant to the contract of sale in interstate commerce, tax does not apply.

If the extruder delivers it to the carrier for interstate shipment or it is shipped interstate by the mold maker, but not pursuant to the contract of sale, tax applies. In the case of shipment by the extruder, the goods would have been delivered to the purchaser's representative in this state. In the case of shipment by the mold maker but not pursuant to the contract of sale the initial delivery to the extruder was delivery to the purchaser's representative in this state and, thus, taxable notwithstanding the subsequent shipment outside the state. 8/15/77.

325.0580 **Title Agreements.** An out-of-state manufacturer purchased tooling from a California retailer pursuant to a purchase order which provided that the purchaser would take delivery from the retailer in California and would transport the tooling out-of-state, with title to pass to the purchaser after final acceptance at the out-of-state manufacturing plant.

Since the tooling was delivered by the seller to the purchaser in this state, the sale was made in this state and was subject to sales tax. The agreement that title was to pass subsequent to in-state delivery at a point outside this state was limited in effect to a reservation by the seller of a security interest in the goods sold and did not have the effect of rendering the transaction a sale at the out-of-state destination. 9/6/66.

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325.0597 **Use in Interstate Commerce.** Sales and Use Tax Law sections 6368, 6368.1, and 6368.5 create exemptions for watercraft and rail freight cars when they are for use in interstate or foreign commerce, even if the use is entirely within this state in connection with interstate or foreign commerce activities. This exemption does not extend to other modes of transportation entering California in interstate or foreign commerce and then operating entirely between termini in this state, even though the transportation is in connection with interstate or foreign commerce. 3/11/81; 7/10/96.

325.0600 **Use on Out-of-State Project.** The sale of tools and equipment delivered in California are subject to sales tax irrespective of the fact that the purchaser contemplates transporting such property out-of-state for use on a construction project in such state. 3/3/53.

325.0602 **Vehicle Deliveries Outside California.** It is the responsibility of the dealer to demonstrate that a vehicle was delivered to the buyer at an out-of-state point. One method of demonstrating out-of-state delivery is to have both the buyer and the driver execute a certificate of out-of-state delivery before a Notary Public at the out-of-state location where the delivery occurs. The Notary's certification should indicate that both persons were present to sign the certificate. The certificate will normally be accepted not as the truth of the facts stated in the certificate but as documentation that both persons were actually present at the location on the date of delivery. The driver should also obtain receipts for gasoline, hotel rooms and return transportation. 9/26/88.

325.0602.600 **Vessel Delivered Outside California Waters.** Taxpayer is purchasing a new vessel from a California manufacturer and seller (seller). The taxpayer has paid progress installments to the seller for work completed on the vessel. Under the terms of the contract of sale, the taxpayer will make final payment for the vessel after final inspection and delivery of the vessel at a point more than three nautical miles from California. The taxpayer will take a separate transport vessel to meet the vessel for final inspection and approval. After final inspection and approval, the taxpayer will give the final payment to the seller and the seller will give the taxpayer a bill of sale. Title to the vessel will pass from the seller to the taxpayer at that time.

After taxpayer obtains possession and control of the vessel, the taxpayer will pleasure sail the vessel for the day and return the vessel to a California harbor. The vessel will remain in this state for less than 90 days. While in California, it will be prepared for shipment via common carrier to Florida. In Florida, the vessel will be reassembled and sailed in international waters, and then to its final destination at a point in the Mediterranean Sea.

The first functional use of the vessel after its transfer to the taxpayer will occur outside of California when it is used for pleasure sailing. However, since the vessel will reenter California within 90 days of its completed delivery and purchase, it is presumed to have been purchased for use in California. If the purchaser establishes that the vessel is used or stored outside of California one-half or more of the time during the six-month period after it enters California,

the vessel will not be considered purchased for use in California and its use will not be subject to use tax. 5/30/97. (Am. 2001–3).

325.0603 **Vessels Delivered Outside California Waters.** Vessels which are delivered by the seller to the buyer at a point outside California waters are not subject to sales tax. The seller may be required to collect use tax if it knew or should have known that the buyer was a California resident, unless the seller takes a statement from the buyer that the buyer intends to use the vessel at a specific out-of-state point. 10/31/74.

325.0606 **Proper Documentation Essential for Exemption.** If a transaction is intended to be exempt in foreign commerce, it is necessary that the terms of the sales agreement be so constructed as to indicate the contemplation of a sale in foreign commerce. The failure to include any shipping or special instructions on the sales invoice for a TV set, even though a space is provided thereon for such instructions, creates the assumption that none were given at the time of sale. The fact that the TV was picked up at the retailer's place of business by a household goods carrier for inclusion with the buyer's other possessions being moved to Canada does not cure the defect in the documentation. The exemption for exports does not depend on the intent of the purchaser but depends upon whether at the time of the transaction the goods are within the stream of foreign commerce. 2/13/69.

325.0607 **Qualifying as a "Carrier."** Company A, an owner and operator of offshore oil drilling platforms located in waters outside California state boundaries, purchases goods for the platforms from California vendors who deliver the goods to a port in California. The goods are accepted by B, an independent contractor, under an agreement with A to perform the service of consolidating and loading the goods onto a ship. The ship is chartered by A from C, the owner of the ship, under a ''bareboat'' charter agreement. At the same time, A enters into an ''operating agreement'' with D, an ''operator'' who agrees to man, operate, victual, navigate and supply the vessel.

D, the operator, qualifies as a ''carrier'' under section 6396 and the requirements of that section are met when the goods are delivered by D to A's offshore facilities. The operating agreement is in essence a subcharter agreement under which A bareboats the vessel to D, who in turn agrees to carry goods for A. 10/14/75.

325.0610 **Satellite in Orbit.** Sale of a satellite with title passing to the customer while the satellite is in earth orbit is not subject to the sales tax since the satellite while in orbit is outside the state's taxing jurisdiction. Furthermore, the seller's use of the satellite through its ground communication stations located in California will not be subject to use tax. Such use will occur while the satellite is in orbit and physically outside the state. 12/23/83.

325.0611 **Printed Matter Mailed Out of State.** An advertising agency which contracts to sell printed letters and mailers and directly mails them to out-of-state addresses is exempt from sales tax on such sales if the customer requires the agency to ship or mail them to the out-of-state addresses.

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On the other hand, if an agency's agreement with the customer provides that the advertising agency is purchasing the printed matter as an agent for the customer, tax applies to the printer's charge since the printer would be making a retail sale of the printing in California. This is true whether or not the agency subsequently mailed the printed material out of state. 6/1/83.

(2) DELIVERY TO PURCHASER IN STATE
See also Exports, (5) below.

325.0612 **Aircraft Engine Sold to a Foreign Air Carrier.** A jet aircraft engine was sold to a foreign air carrier. The sales invoice provided the following information: the engine was shipped FOB to Redwood City, California by a drayage company, the engine was to be shipped by the purchasing air carrier to a European city on an air freight waybill, ''payment due upon completion of test cell acceptance,'' and payment of $625,000 was to be made by a bank to bank transfer (which was done at a later date).

The purchase order from the purchasing air carrier indicates FOB Redwood City for shipment by the purchaser to the European city and it states: ''Engine unused and in same condition since previously received from the purchaser. Acceptance of engine after inspection and test cell run in accordance to the PWA overhaul manual at the European city. In case test run negative, purchaser will pay for transportation cost back to owner. Payment terms: cash after successful inspection and test run.''

Under the above circumstances, the sale of the engine occurred in Redwood City and not in the European city after the tests performed by the purchaser. For purposes of Sales and Use Tax Law, a sale is any transfer of title or possession, conditional or otherwise, for a consideration. The consideration the seller received for the transfer of possession was the purchaser's obligation to test the engine and pay the seller $625,000 if the engine conformed to the contract.

The only condition to that transfer was that the purchaser pay the sales price or return the engine if it did not conform to the contract. Therefore, the seller sold the engine in Redwood City, when it transferred possession to the purchaser. The purchase order and sales invoice do not provide for passage of title, but even if they did, a retention of title by the seller would be limited in effect to security interest.

The contract in this situation is also not a ''sale on approval.'' If a contract between a seller and a purchaser was a sale on approval, the sale might not be subject to the tax depending on where the sale is determined to have occurred. Commercial Code section 2336 specifically states that ''if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is (a)'' ''sale on approval'' if the goods are delivered primarily for use . . . '' The contract in this situation does not permit the purchaser to return the engine regardless of its conformance to the contract. The sales invoice and the purchase order discloses a good faith duty by the purchaser to test the engine and pay the sales price if the engine conforms to the contract. This is not a sale on approval.

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Since the sale in this situation occurred in California, it is subject to sales tax unless it conforms to the exemption provided by Regulation 1621. 1/26/87.

325.0613 **Auctioneer Sales.** An auctioneer sells horses to an out-of-state buyer. Prior to purchase, the buyer furnishes the auctioneer with a document requiring that any horses purchased be shipped out of state. The bill of lading shows the buyer as the consignor and the carrier is paid by the buyer. Tax does not apply because the auctioneer is required to ship the horses out of the state as a condition of the transaction and the animals are so shipped. 5/24/66; 5/29/96.

325.0614 **Bus Leased Not a Common Carrier.** A lessor is engaged in the business of renting tax-paid film and lighting equipment including vans or busses to house and transport the equipment to film production locations. The equipment that houses and transports the filming and lighting equipment consist of greyhound-like busses described as mobile filming studios which contain technical equipment including a self-contained power source. The lessor always requires a trained driver-technician to operate the equipment every time the unit is leased. These driver-technicians are trained by the lessor but are not on the lessor's payroll for labor union reasons. Lessees must have a driver-technician trained by the lessor and may select anyone they wish, otherwise the lessor designates a driver. The drivers are paid by the lessees of the equipment as independent contractors. The lessor has no control over the driver or the equipment. Custody of everything on the bus is in the driver until the bus reaches its out-of-state destination.

In addition to leasing the bus and equipment, the lessor sells filming supplies which are purchased and consumed by the lessee-producers who lease the equipment. The supplies needed are estimated by the lessee-producers, placed on board the bus before it leaves the lessor's place of business, and transported to the out-of-state destination where filming is done. The supplies are used as needed during the filming operations and when the equipment is returned to the lessor, an accounting for the supplies is made and the lessee-producer is billed for everything not accounted for and returned.

The arguments that the supplies are consigned goods and that there is no sale until the supplies are withdrawn from the bus and consumed at the out-of-state destinations are not valid.

The above transaction does not involve a consignment because the sale of the supplies is not a sale for resale to the lessee-producer. The transaction is a retail sale to the lessee producer who is the consumer of the supplies. Also, a sale is not dependent on when or where the property is consumed physically.

The sales of filming supplies are not exempt from the sales tax under Regulation 1620(a)(3)(B) since none of the requirements are met. First, the bus is under lease to the lessee-producer, and the driver is being paid by the lessee-producer. Therefore, the lessor is not using his facilities or his employee to transport the property out of state. Second, the bus is not a common carrier. Also, the transaction is subject to sales tax under subsection (a)(3)(A) which states in part that ''sales tax applies when the property is delivered to the purchaser or his representative in this State.'' 7/14/81.

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325.0616 **Common Carrier as "Carriers."** A common carrier is not a "carrier" of goods pursuant to Regulation 1620(a)(3)(B)(2) if at the time of shipment the common carrier owned the goods and, therefore, was not transporting personal property owned by other persons. Thus, if the common carrier does not qualify for the exemption provided by section 6385, it cannot claim an exemption under Regulation 1620(a)(3)(B)(2) for goods which are subsequently shipped out of state. 8/20/85.

325.0617 **Contract Carrier.** A taxpayer sells property to a corporation, one division of which is an authorized contract carrier. The property sold is delivered in California to the contract carrier division of the buyer. The property is transported to Florida by the contract carrier division for use by another division.

The sale is not an exempt sale in interstate commerce because the property was delivered to the buyer in this state. Further, section 6385 of the Revenue and Taxation Code is inapplicable because it exempts only sales to common carriers. 5/4/90.

325.0620 **Carrier Furnished by Purchaser.** None of the Court decisions are authority for the proposition that the sales tax does not apply where the goods are delivered to the purchaser in this state, even though the purchaser may subsequently transport the goods outside the state. The case of *Richfield Oil Company* v. *State Board of Equalization*, 329 U.S. 69, stands for the proposition that where the goods are delivered by the vendor into an exporting carrier sent to this country for the express purpose of receiving the goods and carrying them abroad, title to the goods passing to the buyer upon delivery into the exporting carrier, the sale was exempt upon the grounds that at the same time title passed the goods became exports. 10/30/50.

325.0640 **Carrier Furnished by Purchaser.** The tax does not apply where, pursuant to the purchase order, the goods or the shipping case in which they are packed for export, are marked showing the foreign destination, and the goods or cases are delivered to a carrier provided by the purchaser for the purpose of receiving the same for shipment abroad without further packaging or processing. 1/6/53.

325.0660 **Carrier Furnished by Purchaser.** The sale of dredging equipment to a purchaser for use in operations in Japan, was a sale in foreign commerce, where the equipment was delivered to a barge owned by an agent of the purchaser and transported thereon to the purchaser's job site in Japan. 11/19/64.

325.0662 **Carrier Furnished by Purchaser—Leased Rail Cars.** A California taxpayer is selling asphalt to a customer based in Utah. The customer has a valid seller's permit for Utah which is on file in the taxpayer's office. The purchaser does not have a customer base in California and intends to resell the asphalt in Utah. A letter to that effect is also on file in the taxpayer's office. The transportation of the asphalt was arranged by the Utah customer through the leasing of rail cars. The product is loaded into the rail cars leased by the customer at the refinery located in California. Ownership of the product becomes the customer's at that time.

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The property is not delivered to a carrier hired by the purchaser but is instead delivered into rail cars leased by the purchaser, that is, the property is delivered to the purchaser. That delivery takes place in this state. Therefore, the sale does not qualify for the interstate commerce exemption under Regulation 1620.

However, if the purchaser intends to resell the asphalt, the California retailer may accept a valid resale certificate from a purchaser for property delivered in California which is purchased for resale out of state. The certificate must contain the elements required by Regulation 1668(b). If the purchaser does not have a California seller's permit number, the out-of-state permit number must be noted on the certificate. 7/21/95.

325.0663 **Common Carrier Hired by Customer.** An auctioneer makes sales to customers who hire common carriers to transport the property sold to points outside California. The bill-of-lading shows the customer as both the shipper and the receiver. The common carrier picks up the property at the auctioneer's location and delivers it to the customer's out-of-state location. The customer does not take physical possession of the property in this state.

If the contract of sale requires the property to be shipped out of the state, and if the customer is not known by the auctioneer to be a California resident, the auctioneer is not liable for sales tax or for collecting use tax from the customer. 5/12/94.

325.0664 **Carrier Hired by Purchaser.** An instate retailer will ship merchandise from a location within California. The purchaser will choose the carrier, who will pick up the merchandise and deliver it to the purchaser's location in another state.

For purposes of this opinion, it is assumed that neither the purchaser nor its agent or representative will take possession or control of the merchandise in this state. It also is assumed the purchaser will hire a common carrier to take delivery of the merchandise in California, the purchaser is not a resident of California, and the merchandise is purchased for use outside California. The two requirements of the interstate exemption are: the contract of sale must require shipment outside of California, and the property must be shipped outside of California without the purchaser or its agent or representative taking possession or control of the property in California. When a common carrier transports the property outside California, either party can hire the carrier. Accordingly, if the transaction satisfies these conditions of the exemption, the sale would be exempt from sales tax. 11/2/95.

325.0664.150 **Delivery to Foreign Purchaser in California.** An aircraft firm contracted with the United States to convert four piston aircraft to prop jet aircraft. The aircraft were delivered and allowed as an exempt sale to the United States.

One of the aircraft caught fire in Canada, but essential parts including the engine and props were salvaged. The Canadian government contracted directly with the aircraft firm to convert another piston aircraft into a prop jet aircraft

using the salvaged parts. The converted plane was delivered to the Canadian government in California and flown to Canada.

The second contract is not an extension of the initial contract with the United States. The sale by the aircraft firm to the Canadian government is subject to tax. The fact that the parts furnished by the repairer were removed from the state does not make the transaction exempt as a sale in interstate or foreign commerce. The exemption for property sold for delivery to a ship or airplane for transportation out of the country does not extend to the removal of the very items sold when that removal is accomplished under the property's own power. 5/28/68.

325.0664.200 **Delivery in State to Out-of-State Retailers.** An Oregon lumber wholesaler purchases lumber from a California mill, and sells it to an Arizona customer, FOB mill. The Arizona manufacturer has a common carrier pick up the lumber with title passing at the mill. The Arizona customer does not have a California seller's permit, and alleges it does not need one since it makes no retail sales in California.

Under these facts, the sale does not qualify as a sale in interstate commerce because there is no contractual requirement between the wholesaler and its customer that the property be shipped to a point out of state. This sale would qualify if the contract required that the lumber be shipped out of state by common carrier, even though the carrier was engaged by the customer.

With respect to the need for a seller's permit, the Arizona customer would need one if it makes any sales in California, even if none of them are at retail. However, if the customer is purchasing the lumber for resale at an out-of-state location, it may issue a valid resale certificate specifying that a permit is not required because no sales are made in California. If such a certificate can be taken in good faith by the seller/wholesaler, the sale is not subject to sales tax, even if the property was picked up at the mill by the customer. 3/15/89.

325.0667 **Instate Delivery to Purchaser.** A printer located in California prints brochures for a customer who is also located in California. The customer notifies the printer that the customer will be shipping half of the brochures to Germany (the brochures are being printed in German). All of the brochures are delivered to the purchaser in California.

Sales tax applies when the property is delivered to the purchaser or the purchaser's representative prior to an irrevocable commitment of the property into the process of exportation. It is immaterial that the disclosed or undisclosed intention of the purchases is to ship or deliver the property to a foreign country or that the property is actually transported to a foreign country. In this case, the brochures are delivered to the purchaser in California. The sale is complete at that time, before the entry of the brochures into the stream of export. Therefore, sales tax applies. 8/8/96.

325.0670 **Lease of Trailer by Bank.** A California bank purchases a trailer chassis from a California manufacturer with delivery in California. The bank is acquiring title for purposes of security. The bank will immediately lease the chassis to a corporation which will sublease it to an affiliate. The chassis will

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have an unladened weight of 6,000 pounds or more, will be registered out of state, and will be used exclusively outside California or exclusively in interstate or foreign commerce, or both, and will be moved, loaded with cargo, from California to a point outside the state within 75 days after delivery by the manufacturer. The bank will provide affidavits pursuant to section 6388.5 to the manufacturer.

Based on the above circumstances, questions relating to the above transaction and its corresponding answer follows:

(1) Since the bank is making the purchase solely of security, will the exemption available under section 6388.5 apply to the purchase and immediate lease of the chassis by the bank?

The above lease by the bank is a lease of mobile transportation equipment and, accordingly, is not a sale. Either the sale of the equipment to the lessor or its use in this state may be subject to tax. In this situation, the exemption provided by section 6388.5 applies even though the sale is to a lessor and the mobile transportation equipment is delivered to and is thereafter used by the lessee.

The same result follows with use by the sublessee. Since it is the intention of the lessor to immediately sublease the chassis to an affiliate, the use in interstate or foreign commerce, or both, by the sublessee would be imputed to the lessee/sublessor which would in turn be imputed to the bank and the exemption of section 6388.5 would apply to the sale by the manufacturer.

(2) Will the exemption provided by section 6388.5 be applicable if the chassis carries a load on their initial movement out of California?

The chassis may carry a payload out of the state without loss of the exemption provided it is a payload in interstate or foreign commerce, or both.

(3) Can the chassis, if purchased within the exemption of section 6388.5 and used exclusively in interstate or foreign commerce, be assigned to a California depot?

The chassis may return to California and may be assigned to a California depot, without loss of exemption, provided, however, that the use of the chassis is exclusively the carriage of interstate or foreign commerce goods, or both. After leaving the state, the chassis may return to California, and even remain in California, as long as they are exclusively carrying interstate or foreign commerce goods, or both. However, if so much as one carton is for intrastate commerce, the exemption will be lost. 4/19/85.

325.0677 **Mother Ship.** A ‘‘mother ship’’ of a cooperative association resupplies a fleet of fishing vessels belonging to its members. Fuel is purchased for the association’s ship and also to resell to the members. The association also transports supplies and ship stores which are purchased in the members’ names and are transported to a prearranged rendezvous area.

The fuel which the association resells to its members on the high seas may be purchased for resale. The fuel which is used by the mother ship is subject to tax. The exemption provided for in section 6385 is not available. The ‘‘mother ship’’ is not engaged in transporting persons or property in interstate or foreign

commerce as required by section 6385(a). Also, the ''mother ship'' is not engaged in fishing operations which would entitle it to the exemption provided by section 6368.2. Its income is not from fishing operations but rather from transporting cargo and selling fuel.

The ''mother ship'' is a carrier for the purposes of Regulation 1620(a)(3)(B). Thus, the sales of ship stores and supplies to the members transported out of state pursuant to the contract of sale will be exempt. 7/23/85.

325.0678 **Photographic Sales and Supplies.** A company is considering operating a photographic processing mini lab and film store on board cruise ships that pick up passengers at California ports. The company will purchase photographic supplies from California retailers to be delivered to a freight forwarder in California for subsequent loading onto the cruise ship. The company will take delivery (possession) of the supplies once they have been brought on board the ship. The company will have no offices or employees in California and the supplies purchased by the company will either be for resale or for its use in developing film and printing photographs on board the ship. All of the sales will be made in international waters to passengers on the cruise ship and the usage of the supplies by the company will also occur in international waters.

With regard to the company's purchase of supplies which it intends to resell on board the cruise ship, the company can provide its California vendors with a resale certificate and purchase those items ex-tax. The sale of those photographic supplies purchased by the company from California vendors for the company's own use are taxable since the company takes possession of the supplies when they are delivered to the company on board the ship in California. Property purchased in California under a resale certificate and subsequently used outside of California, which at the time of purchase was contemplated to be resold, is excluded from tax. However, if at the time of purchase, the purchaser knew that the property purchased for resale was not to be resold, the purchaser is liable for tax. 10/7/86; 7/11/88.

325.0678.800 **Sale of Drill Platform.** Company A, an electrical and mechanical construction contractor, entered into a fixed price, lump-sum contract with company B, dated July 1985, to construct a ''topside'' for an oil platform which was to be installed at an offshore, outer continental shelf drilling site. The topside structure was to be mounted on an underwater structure. It included living quarters, equipment, and working areas. The contract provided that Company A would deliver the topside structure by contract carrier to Company B at the offshore site, outside California waters. Company B's acceptance was to be at the offshore site. Company A leased land in a California city for performance of the work and it was intended that the finished topside structure would be shipped by barge from a California city to the offshore location. Because of delays in obtaining special steel and changes in design, work under the contract fell behind schedule.

The parties disagreed over the amounts of compensation and relations between the parties become strained. In December 1986, Company B entered into an agreement with Company C for further construction work on the topside

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structure. The topside structure was completed by Company C which shipped the structure to the offshore location. Company A claims that the original contract was never terminated and, since the contract was for the sale of property in interstate commerce, no tax applies. Further, if Company A is regarded as transferring title in California, title was transferred to Company C in a sale for resale.

While it is true that the contract specifically required any modification to be in writing and there is no evidence of written modification, the acts of the parties under a contract offered the most valuable means at ascertaining their intentions. The key facts in this regard are: (1) Company A ceased carrying insurance on the property, (2) Company B took over the inventory of materials and the lease of the California city site, and (3) Company B entered into a separate contract with Company C to complete the work. These facts are consistent only with an intention of the parties to terminate the contract. The contract was terminated and that termination resulted in a sale by Company A to Company B in California. There is no support for the claim that it was a resale from Company A to Company C. Company A had no duties to perform for Company C and received no consideration from or on behalf of Company C. Company A's sale was a retail sale in California and subject to sales tax. 11/20/90.

325.0679 **Sales to Foreign Naval Vessels.** Sales tax applies to sales to foreign naval vessels in California even though deliveries were made directly to the vessels, unless title passed within, and delivery was made out of a foreign trade zone, in which case neither sales nor use tax would apply. 2/15/74.

325.0680 **Servicemen.** There is no basis for exemption from sales tax of sales to servicemen to take delivery of an automobile in California but drive it from California on a driveaway permit and registers it in another state. When the vehicle is delivered to the purchaser in this state the sale is completed insofar as the sales tax is concerned. 5/23/57.

325.0685 **Storage in California by Buyer.** A corporation purchases children's clothing from California manufacturers. The clothing is shipped to the corporation's warehouse in California and is not being held for resale. The clothing is repackaged at the warehouse and shipped by the corporation to its out-of-state location. The clothing is not resold.

Because delivery is made to the buyer in California, the exemption for sales in interstate commerce does not apply. The sale is subject to tax. 8/4/94.

325.0690 **Time of Sale.** A horse was located in California on the date that a purchase and sale agreement was executed. Pursuant to the agreement title was to pass upon the purchaser receiving a warranty bill of sale, the JockeyClub registration certificate and confirmation that the interest being sold was free of liens. However, the right to possession and control of the horse passed to the buyer upon execution of the agreements.

The horse was removed from California six days after the agreement was signed and approximately two weeks later the two documents were delivered.

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The sale of the horse occurred in California because:

Possession and control passed in California as evidenced by the fact that the day following the agreement the horse raced under the purchaser's personal colors rather than the seller's personal colors.

Title, ownership and possession of the horse passed in California when the seller completed its performance with respect to physical delivery of the horse. The reservation of any title was a security interest. 7/23/92.

325.0696 **Delivery of Fuel into Pipeline.** An oil company made a sale of diesel fuel to a customer at its refinery for delivery into a pipeline. The terms of the sale were FOB at the pipeline receiving meter, with title and risk of loss passing to the purchaser at the meter, and volumes based on meter readings.

Because the oil company delivers the product into the pipeline, the meter ticket will show the oil company as the shipper. The term ''shipper'' means the supplier of the product, who may or may not be the owner of the product moving in the pipeline. The pipeline receiving ticket does not show the ultimate destination but does show to whom the batch belongs. The customer, purchaser, became the owner of the product when title passed at the pipeline receiving meter. Consequently, the customer (purchaser) was the actual shipper and the movement of the product in the pipeline was subject to its control. Accordingly, when a tender is made into a pipeline, one or more destinations are nominated. However, it is possible for the shipper (purchaser) to direct all or part of the volumes without the knowledge of the supplier (oil company).

Under this scenario, the sale is not exempt as a sale in interstate commerce. The contract between the oil company and the customer does not require that the fuel be shipped out of state. The contract merely provides for delivery of the fuel to a carrier or directly to the purchaser in this state. This does not satisfy the requirements of the exemption that property be required by contract to be shipped out of state. Therefore, the oil company's sale to the customer is subject to tax.

The transaction could be structured to satisfy the requirements of the exemption. First, the contract would have to require that the fuel be delivered to a carrier for shipment out of state. Second, the fuel must actually be shipped out of state. The oil company must retain documents to establish that fuel was delivered to the carrier and actually shipped out of state. 10/14/87.

(3) INSTALLATION IN STATE GENERALLY

325.0698.200 **Delivery of Aircraft.** A firm engaged in the maintenance, modification, and servicing of aircraft entered into an agreement with a leasing company with no offices in California to modify an aircraft for the leasing company. The work was to be done in California but the firm was required to deliver the aircraft outside California and the leasing company certified that the aircraft modification was purchased for use outside California. The aircraft was to be delivered by December 20, 1979. Completion of the work was delayed and, on December 20, 1980, agents of the leasing company surreptitiously removed the aircraft from the firm's facilities and flew it to New York. After an arbitration decision issued May 6, 1982, the aircraft was returned by the leasing company to

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the firm in California on July 23, 1982. A final checkout and test flight was conducted on that date and the aircraft was delivered to the leasing company outside this state on the next day. The firm believes that the taking of the aircraft by the leasing company's agents did not constitute delivery by the firm because the transfer was not voluntary, that delivery actually took place on July 24, 1982, outside of California, and therefore, that the sale was a nontaxable sale in interstate commerce.

The concept of ''delivery'' comprises elements of participation, agreement, or voluntary action and could also include permissiveness if not action. The taking of the aircraft by the leasing company's agents involved none of these elements. Therefore, the company did not deliver the airplane to the leasing company in California on December 20, 1980, but did deliver the aircraft out of state on July 24, 1982. The sale qualifies as a nontaxable sale in interstate commerce. 8/22/83.

325.0700 **Overhauled Aircraft Engines.** The sale and installation in California of overhauled aircraft engines in the following situations are not exempt:

(a) Engine is sold to customer in Canada with installation in California.

(b) Canadian customer purchases new aircraft (minus engines) in California and orders overhauled engines to be delivered to aircraft company for installation in California after which plane will be flown to Canada.

(c) Out-of-state American customer has overhauled engine delivered to point in California for installation. Subsequently, plane is flown out-of-state. 4/30/57.

325.0720 **Overhauled Aircraft Engines.** An out-of-state owner of an aircraft engine and mount assembly enters into contracts with a mount repairman and an engine overhauler for repair of both units. The engine, with mount, is sent by common carrier to the mount repairman in California, who removes the engine and repairs the mount. The engine overhauler obtains the engine from the mount repairman, overhauls the engine, and returns it to the mount repairman who remounts the engine and returns the completed assembly by common carrier to the out-of-state owner. Since the mount repairman takes delivery of the overhauled engine in California as representative of the owner, the parts used by the overhauler to repair the engine are regarded as having been sold and delivered in this state and sales tax applies as indicated in the regulation. 7/1/65.

325.0760 **Replacement Part Installation.** The sale to out-of-state customers of replacement parts which are attached to repaired cameras is exempt from sales tax. Although title to the replacement parts may pass when installed in the camera, under the theory of accession, the transaction comes within the terms of the regulation. The exempt status of the replacement parts depends on the fact that delivery to the customer is made out-of-state, pursuant to the terms of the repair contract. 7/16/57.

325.0780 **Repair or Modification.** Sales of repair parts or materials used in repairing of engines, modification of aircraft, etc., are exempt interstate sales where the contract requires the party doing the repair or modification work to ship the repaired articles or modified aircraft to which the repair parts and

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materials are attached, to a point outside this state by its own facilities or by a carrier. It is immaterial that the repair parts or materials used in modification may be installed upon or attached to engines, aircraft or other property in this state belonging to the customer prior to the time the repaired or modified items are actually shipped or delivered to a carrier for shipment. 4/23/58.

325.0782 **Sale of Slide-In Camper to Foreign Purchaser.** A Canadian purchased a slide-in camper from a retailer in this state which was installed on the purchaser's truck. The purchaser then returned with the camper to Canada.

There are two notable exemptions from tax for sales of property to persons for use outside this state:

Section 6396 provides an exemption from sales tax from sale of tangible personal property when the contract of sales requires the retailer to ship the property to a point outside this state, and the retailer does ship the property to the out-of-state point by the retailer's facilities or by delivery to a carrier for that shipment. Since the retailer of the camper did not ship the property to an out-of-state point, the exemption does not apply to this sale.

Section 6366.2 provides for an exemption from tax for the sale and use of a new motor vehicle sold to a purchaser who is a resident of a foreign country and who arranges for the purchase through an authorized vehicle dealer in the foreign country prior to arriving in the United States if the following conditions are met. First, the purchaser must obtain an in-transit permit pursuant to California Vehicle Code section 6700.1. Second, before the in-transit permit expires, the retailer must ship or drive the motor vehicle to a point outside the United States. Since the slide-in camper is not a new motor vehicle, its sale could not qualify for exemption under section 6366.2. 2/27/97.

(4) DELAYED SHIPMENT; USE PRIOR TO SHIPMENT; ''BAILEE CLAUSES''

325.0800 **"Bailee Clause" Inoperative.** ''A'' corporation located out-of-state but wholly owned by ''B'' corporation in California purchases a truck chassis from a California manufacturer with instructions to deliver it to ''C'' Corporation in California for the installation of body and tanks. Order contains a ''bailee clause,'' stating that ''C'' corporation acts as bailee for the seller. Subsequently, the truck is delivered to ''B'' corporation in California for painting and following this operation the truck is delivered out-of-state to ''A'' corporation.

The so-called ''bailee clause'' is, under the circumstances, inoperative to create a nontaxable interstate sale. The initial delivery in this State to the buyer's representatives and the substantial work performed on the truck by such representatives are inconsistent with the retention of ownership by the seller. 11/23/53.

325.0820 **Body-Chassis Assembly Before Shipment.** Pursuant to an out-of-state customer's purchase order with ''bailee clause'' a retailer is required to deliver a truck chassis to a body works for installation of a body purchased by the out-of-state customer and thereafter deliver the completed unit to a common

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carrier for shipment to the out-of-state customer. In such case an exempt interstate sale of the chassis results. 1/21/59.

325.0840 **Body-Chassis Assembly Before Shipment.** Truck chassis delivered by manufacturer to consumer's agent in California who, pursuant to buyer's instructions, was to install a special body thereon, is a retail sale in this state by person making delivery, notwithstanding the fact that the dealer and buyer are located out of state. 9/1/53.

325.0860 **Body-Chassis Assembly Before Shipment.** Sales of truck chassis made out-of-state with delivery to California corporation for the purpose of installing tanks thereon with subsequent shipment of completed trucks out of state to ultimate consumers are interstate sales exempt from tax. The installation of the tanks in such instances was not a taxable use in California. 2/10/53.

325.0880 **Body-Chassis Assembly Before Shipment.** Pursuant to a customer's purchase orders, both the body builder and the chassis builder are required to ship or deliver the property sold by them to an out-of-state point. Before shipment, the body will be installed upon the chassis and the complete vehicle shipped as a unit by the chassis builder. Where the body builder enters into an agency agreement with the chassis builder authorizing the latter to act as the body builder's agent in carrying out the delivery requirement, both the sale of the chassis and the sale of the body are exempt interstate sales. 4/17/67.

325.0882 **Delayed Out-of-State Shipment.** An auctioneer sold a horse in California to a purchaser who had his agent haul the horse in her van to a ranch in Arcadia, California. The horse was shipped to Kentucky one month after purchase. The purchaser's agent was not an interstate hauler nor freight forwarder. The purchaser was shown as both shipper and consignee on the shipment to Kentucky. He stated that the delay was caused because he could not obtain rail space for the horse any sooner. Under these conditions, the exemption for sales in interstate commerce is inapplicable since the seller delivered the horse to the buyer in California.

The auctioneer also sold 16 horses over a period of three days to a rancher from Laredo, Texas, and delivered them to a ranch in Lancaster, California, via a van line company. The auctioneer was shown as the shipper. After about a month in Lancaster, pending the availability of vans going to Texas, the horses were picked up by the van line for shipment to Texas. The Lancaster ranch was shown as shipper. If the ranch held the horses on behalf of the van lines (because they had to be grazed and watered while waiting for transport to Texas), the sale is exempt as a sale in interstate commerce notwithstanding the delay in shipment. If the ranch held the horses on behalf of the out-of-state purchaser, the exemption is not applicable because delivery was made to the purchaser's agent in California. 2/24/69.

325.0884 **Delayed Shipment.** A firm sells a horse for shipment out of state. Responsibility for board and expenses rests with the buyer upon execution of the sales agreement. Under the installment contract, title and registration remains

with the seller until the final payment is made which may be as long as five years after the sale. The horse may be insured by the buyer or seller but the buyer usually is required to maintain insurance equal to the balance due on the contract.

On occasion the delivery to the buyer may be delayed because (1) the horse is in foal, or (2) until the buyer arranges to rendezvous with the seller at an out-of-state exhibition, or (3) for some other economic or practical reason. During the delay, the horse is not bred or used for any business purpose. Ultimately the horse is shipped out of state pursuant to the contract of sale.

The sale is exempt from tax pursuant to section 6396. The delay in delivery for the reasons described above will not cause the transaction to lose its exempt status. 8/1/84.

325.0886 **Delivery to Purchaser's Representative.** The sale of tangible personal property in California to an out-of-state customer, delivered by the seller to an in-state fabricator designated by the purchaser for further processing, is a taxable sale even though the fabricator may subsequently ship the property out of state pursuant to its contract with the customer. The fabricator is the representative or agent of the customer and delivery to it in California precludes the application of the interstate commerce exemption. If the fabricator had been contracted by the seller rather than the buyer, if payment was due from the seller, and if the seller was liable to the customer for any losses or damages, the subsequent out-of-state shipment by the sub-contractor/fabricator (pursuant to the seller's contract with the customer) would be a sale in interstate commerce. 10/6/92.

325.0900 **Inspection by Purchaser.** Although such items as prints may be delivered to a purchaser's representative in California for inspection and returned to the vendor for out-of-state shipment without preventing the seller from validly claiming exemption as an interstate sale, where the purchaser makes use of the property, such as positive editing, the delivery in this state to the purchaser for such purpose prevents the seller from subsequently validly claiming the interstate exemption. 6/3/57.

325.0920 **Inspection by Purchaser.** If the contract of sale requires the seller to ship the goods sold to an out-of-state point and in fulfillment of the contract the seller, in fact, so ships the property, a prior temporary transfer of possession to the buyer for visual inspection or testing will not deprive the seller of the interstate commerce exemption, provided the property is returned to the seller for out-of-state shipment in accordance with the contract of sale. 11/16/64.

325.0925 **Manufactured Goods Held for Subsequent Shipment Out of State.** A manufacturer contracts to manufacture certain goods, store them, and subsequently ship them to Florida when the customer's facilities there are completed. Title to the goods will transfer to the customer when the manufacturing process is completed.

The sale would be exempt from tax provided (1) that the contract specifies that the goods are to be manufactured in advance and held for later out-of-state

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shipment, (2) that the goods are in fact shipped out of state within a reasonable time, and (3) that the goods are shipped in accordance with the requirements of section 6396. 4/26/91.

325.0928 **Matching of Fit.** An out-of-state buyer orders a piece of custom manufactured equipment from a California seller. The seller is instructed to deliver the equipment to a second California manufacturer who is manufacturing a related piece of equipment for the buyer. The second seller checks to assure a precise matching of the two pieces of equipment, and then ships both items to the buyer's out-of-state location. Tax applies to the first sale because there was delivery to an agent of the buyer in this state. Section 6396 restricts the exemption to shipments out of the state by the retailer. 9/13/89.

325.0935 **Obligation Under Contract.** One of the requirements that qualifies a sale to be exempt as a sale in interstate commerce under Regulation 1620 (a)(3)(B) is that shipment by the retailer is required under the contract of sale. This requirement is satisfied in a situation where there is storage prior to shipment and the contract of sale has a provision as follows: ''Title to the stored product will remain with the retailer until delivery by the retailer to the transportation company when removed from storage for shipment.''

While title passes to the customer upon shipment from the storage facility to the customer at an out-of-state location, it is not the transfer of title provision which indicates that the retailer has complied with the shipment requirements of the Regulation. Rather, the contract provision appears to be at least minimally adequate to meet the requirement that there be a provision in the contract of sale which requires the retailer to ship the property sold to the customer at an out-of-state location. Although the contract provision does not expressly require the retailer to ship the property out of state, it does provide that title will not pass until the retailer does ship the property out of state. In this delayed shipment, regardless of when title or risk of loss passes, the retailer has obligated itself to ship the property sold to the customer out of state. 3/28/90.

325.0960 **Parts Produced from Molds.** Out-of-state customer contracted with a California manufacturer for the production of certain molds which were to be retained by the manufacturer for use in producing parts, title to such molds to vest in the customer upon completion of their manufacture. No parts were ever produced in California and subsequently the molds were shipped to the out-of-state customer.

Contract obviously intended that possession of the molds was to remain with the California manufacturer for subsequent use in making parts and there is no basis for holding such sale exempt as an interstate transaction. 8/6/53.

325.0980 **Prints. A seller makes prints from a customer's negative film. The prints are delivered to the customer in California.** Subsequently from within a few days to as long as two or three weeks later the customer returns the print to seller and requests seller to ship it out-of-state for his account and credit him for the sales tax reimbursement which seller charged when the customer originally picked up the print at seller's plant. Under these circumstances there has been a

completed sale of the print in this state to customer and that the fact that he subsequently returns the print to seller, requesting him to ship it outside the state, does not prevent the sales tax from applying. It is only when the seller in fulfillment of the sales agreement delivers the goods to the purchaser at a point outside this state or to a carrier for shipment to the purchaser at a point outside this state that the tax is rendered inapplicable on the basis that the sale is one in interstate commerce. The delivery to the out-of-state point or to the carrier consigned to the out-of-state point must be the act that completes the sale transaction and not an act that occurs subsequent to the completion of the sale. 11/19/51.

325.1000 **Proofs Made from Engravings Shipped Out-of-State.** An engraver makes photoengravings for advertising agencies in California for delivery to out-of-state publishers. Prior to shipment, the engraver furnishes the advertising agencies with progressive and finished proofs and Scotchprints pulled from the engravings. The proofs are furnished for inspection and approval and the Scotchprints as insurance prints from which duplicate plates could be made if the original plates were lost or mutilated. The pulling of the progressive and finished proofs and Scotchprints does not constitute a taxable use of the engravings prior to shipment. If a separately stated charge is made for such proofs and prints, the engraver is the retailer thereof. 7/7/66.

325.1020 **Shipping Instructions—Delayed.** Sale is exempt notwithstanding shipment to out-of-state point is deferred for reasonable time pending receipt of shipping instructions pursuant to contract of sale. 8/17/50.

325.1040 **Storage Prior to Shipment.** California manufacturer produced property under a contract which provided that the goods were to be ‘‘manufactured in advance, and held for future withdrawals’’. Upon completion of manufacture the goods were paid for in full, including the amount for sales tax. Upon subsequently receiving shipping orders, the manufacturer shipped some of the goods to out-of-state points. The sales tax does not apply to sales wherein the goods were eventually shipped to out-of-state points. The manufacturer was obligated under the contract to ship the goods and such obligation was not completed until shipment was made. 5/28/53.

325.1060 **Tapes.** The charge for editing magnetic tapes for an out-of-state customer is not an exempt interstate transaction if the editing company delivers the tapes to a record pressing company in the state designated by the out-of-state customer. The edited tapes must be shipped to the out-of-state customer at a point outside this state for the editing charge to be exempt as an interstate transaction. 9/28/59.

325.1070 **Tooling Held by Manufacturer.** If payment is made in full, but tooling is held by the manufacturer on behalf of the customer without a contractual duty by the manufacturer to deliver or ship it to a foreign destination, the sale of the tooling is fully taxable as a sale which takes place in California.

On the other hand, if the contract provides for the export of the tooling, and the export meets the requirements of Regulation 1620 and there is no functional use

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of the property in this state, the export exemption will apply. If the manufacturer only tests the tooling, it will not be considered a functional use and will not in and of itself disqualify the sale of the tooling from the export exemption. 12/16/93.

325.1075 **Use by Customer Before Shipment.** An out-of-state customer contracts with Vendor A and Vendor B, who are both located in California, for the manufacturing of components which will be used in the customer's out-of-state plant. Separate purchase orders are placed with each vendor which requires the vendor to ship the property to the customer's plant located outside of California. The customer will furnish the common carrier for each out-of-state shipment.

Vendor A's product must be used with Vendor B's product. Vendor B's product must be integrated and tested with A's product at Vendor B's site. Vendor A, being required to ship the property to the customer outside California is also required to ship the property to Vendor B with final shipment to follow after Vendor B has completed its integration and testing.

Upon completion of Vendor B's work, Vendor A will go to Vendor B's site and arrange for delivery of the property outside California. There will be two separate shipments with separate shipping documents. However, both shipments may go out on the same truck at the same time. The shipping terms are F.O.B. origin with title to pass to the customer upon delivery of the property to the common carrier.

Based on information provided, there is more than visual inspection or testing that will occur at Vendor B's premises of Vendor A's product. If more than testing occurs at Vendor B's premises, the nature of the customer's possession is more than the limited and temporary possession of visual inspection or testing of vendor of Vendor A's product. Rather, the customer would be regarded as taking delivery of Vendor A's product in California and the sales tax exemption for purchases in interstate commerce will not apply. 6/19/95.

(5) EXPORTS

325.1080 **APO.** The sale of tangible personal property which is mailed by the seller pursuant to the contract of sale to the purchaser, an employee of the United States Embassy in Bangkok, Thailand, is a sale in foreign commerce notwithstanding the fact that the property is addressed to the Army Post Office in San Francisco and forwarded to the purchaser in Bangkok. 9/28/64.

325.1095 **Certificate of Purchase for Export.** A taxpayer receives a certificate from a purchaser-customer certifying that the property sold will be exported from the United States. Since the property is delivered to the customer in California, the sale is not an exempt sale in foreign or interstate commerce. Since the certificate does not state that the property will be resold in the regular course of business, it is not acceptable as a resale certificate. The purchaser's possession of the product in California defeats the export allegation. 2/27/95.

325.1097 **Continuous Journey.** In *McDonnell Douglas* v. *SBE* (1992) 10 Cal.App.4th 1413, the goods were shipped to an export packer. However, the buyer's employees actually prepared the property for export at the packer's location. The court apparently found the distinction to be immaterial in ruling that

the goods had entered the export stream. In the case of the *Rice Growers Association of California* v. *Yolo County* (1971) 17 Cal.App.3d 227, Cert. Din., 404 U.S. 941, the court held that shipment of property to a collection point of the buyer did not constitute the entering of the property into a continuous journey to a foreign destination.

When goods are sold and shipped to a water carrier which consolidates the property for later shipment for its own use at a foreign destination, the property has not entered the stream of foreign commerce. While the fact that buyer's employees did the packing may be immaterial, the Rice Growers Case, rather than the McDonnell Douglas case, is applicable. The shipment of property to a collection point does not begin a continuous journey to a foreign destination. 6/7/94.

325.1100 **Customization of Motorcycles.** An out-of-state company purchases motorcycles which are customized in California. After the customization is complete, a freight forwarder picks up the motorcycles in California and exports them to a foreign buyer in Japan or Europe. When the out-of-state company will resell the motorcycles prior to any functional use, the customization does not result in a taxable use of the motorcycle.

Since the only transactions by the out-of-state company involve sales in foreign commerce, it is not required to hold a seller's permit. It may issue resale certificates to its suppliers noting thereon that it is not required to hold a seller's permit (See Regulation 1668). 4/23/92.

325.1120 **Delivery at Airport.** Sales tax does not apply if the retailer delivers the goods aboard an aircraft departing for a foreign destination. Sales tax applies if the retailer delivers the goods at any point short of the departing aircraft, e.g., at the ticket desk or in the waiting area, for redelivery aboard the departing aircraft. The above rules apply whether delivery is to the purchaser or to an airline employee. The rules assume that the goods are personal items (e.g., jewelry, cameras, fur coats) which the airlines do not specifically contract to carry by bill of lading. 4/7/53; 11/15/83.

325.1142 **Delivery to Foreign Purchaser's Agent.** A delivery to an agent of a foreign purchaser in California is regarded as shipment to the purchaser. Under these circumstances, there is no irrevocable commitment to the exportation process at the time of sale and therefore no exemption. The supplier is the retailer and must pay sales tax on the sale. If the property is shipped by the supplier directly to a freight forwarder and the agent does not obtain possession of the property, the export exemption will apply if all other requirements under Regulation 1620(a)(3) are met. 4/28/93.

325.1145 **Delivery in State for Subsequent Export.** The delivery in this state of a mold to a foreign purchaser who then shipped it out of the country was a taxable sale even though the mold was never used in this state or country. The seller did not "irrevocably commit the property into the process of exportation." (Regulation 1620(a)(3)(C)(1).)

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Had the mold been used in the production of parts before it was sold to the customer, tax would have been due on cost of the mold as well as on the subsequent sale in this state. 5/18/90.

325.1150 **Delivery of Molds to Extruder for Testing Prior to Shipment.** The delivery of molds to an extruder hired by the purchaser for the limited purpose of testing the molds with title passing at the time of such delivery does not preclude an exemption under Revenue and Taxation Code Section 6387 if the molds are subsequently redelivered by the retailer to an export packer for shipment to an out-of-state location for use solely outside California.

When an extruder hired by the purchaser returns a mold to the taxpayer because of defects revealed during testing, sales tax does not apply if pursuant to the contract of sale the taxpayer then delivers the mold to a carrier for shipment to an out-of-state point.

Sales tax applies when the taxpayer delivers the molds to an extruder hired by the purchaser and the extruder delivers the mold to an export packer or to a carrier for interstate shipment. 10/19/78.

325.1160 **Delivery to Common Carrier.** Delivery of property by a vendor to common carrier with export markings thereon are exempt as export sales where the common carrier does nothing further with the goods than to hold them pending arrival of export vessel, and then places the property aboard the export carrier, 1/17/55.

325.1180 **Exemption Certificates.** A Japanese moving company proposes that its customers who have booked a move with the company to Japan be able, with appropriate documentation, to purchase merchandise tax exempt, and have the items shipped to Japan. Included in the proposed documentation was a California Blanket Sales Tax Exemption form.

Since the export exemption depends on actions for which the retailer is held responsible, and not the purchaser, an exemption certificate issued by the purchaser is not adequate proof of exemption. Instead, each retailer can use an agreement providing that the merchandise would be shipped abroad. The agreement should provide that the purchased items will be shipped via a specific ‘‘carrier, forwarding agent, export packer, customs broker or other person in the business of preparing property for export, or arranging for its export’’, as well as other terms such as which party will pay the shipping costs. The retailer is responsible for insuring that the property is actually delivered to the foreign country, and for obtaining and retaining a bill of lading or other valid documentation as proof of exemption. 9/28/93.

325.1186 **Exports of Donated Medical Equipment.** A nonprofit organization purchases medical supplies and equipment which it donates to hospitals in foreign counties. Since possession of the medical supplies and equipment purchased by the organization passes to the organization prior to an irrevocable commitment of the property to the exportation process, the sales of the medical

supplies and equipment to the organization are subject to sales or use tax. It is immaterial that the intention of the organization is to ship or deliver the medical supplies and equipment to hospitals in foreign counties. 1/18/96.

325.1190 **Exports of Structural Steel.** A company, which fabricates structural steel and acts as a construction contractor throughout the United States, is planning to sell its structural steel to other construction contractors. Some of the steel produced will be sold for export to foreign countries. When the steel is sold for export, it will be delivered to a customs broker or common carrier FOB California. Documentary evidence will be obtained showing the destination of the steel.

The purchases of steel and other raw materials combined during the fabrication process and sold for export as structural steel, will not be subject to sales or use tax in California. The property that is incorporated into the finished structural steel without prior use, may be purchased ex-tax for resale. If some of the raw materials, such as chemicals used as catalysts, are used to produce a chemical or physical reaction during the manufacturing process, those items may not be purchased for resale even if some of the chemicals are incidentally incorporated into the finished product. For example, if flux is used as a cleaning agent or as a means of reducing oxidation, it is considered consumed in the manufacturing process; however, if the flux is primarily used for transmitting desirable alloys, from the flux, into the metal, it may be purchased for resale.

Sales of structural steel for export, will not be subject to the sales tax in California, provided documentary evidence in the form of bills of lading and marine insurance policies are obtained. This applies whether or not the company is responsible for making the arrangements to transport the steel out-of-state. As such, if the sale satisfies the requirements of Section 6396, the exemption applies even though title to the steel is transferred in California. However, if the purchaser obtains possession of the property within the state, the exemption is eliminated. This includes any transfer to a third person, except a common carrier, customs broker, export packer etc. . . , for subsequent shipment outside the state. For example, if the property was transferred to a third person for storage prior to shipment, the sale occurs in California and does not qualify as a sale in interstate or foreign commerce. 1/7/91; l/17/91.

325.1196 **Federal Republic of Germany.** A company has several contracts with the Federal Republic of Germany Ministry of Defense (BWB). BWB's representative within the U. S. A., the German Military Representative (GMR), operates a transportation warehouse and shipping facility in this state. The GMR claims that its shipping facility is operated in such a matter that shipments from within the state of California to the facility are exempt from California sales tax.

The requirements of section 6387 are not met under the above facts. Although the effect of GMR's operation in California may be similar to the operations of a forwarding agent, delivery to a purchasing entity in California will in all cases render the exemption found in section 6387 inapplicable. It is the position of this Board that sales of tangible personal property to the Federal Republic of

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Germany's Ministry of Defense which are delivered to the Ministry's representative in California, the GMR, for later export to Germany, are subject to sales tax. 3/4/81.

325.1200 **"Foreign Countries."** An automobile purchased in California by a resident of the Philippines and delivered to a steamship company by the seller pursuant to contract of sale for shipment to the Philippines is an exempt export sale. 4/19/54.

325.1220 **"Foreign Countries."** Property transported to Puerto Rico is regarded as exported. 1/4/54.

325.1240 **"Foreign Countries."** Shipments to Wake Island and Canal Zone are considered exports and sale of goods so shipped is exempt if requirements of the regulation are met. 6/29/50.

325.1250 **Foreign Government Purchases.** Certain equipment can only be sold to foreign governments for use outside the country. The federal government monitors these sales to assure that the property is in fact exported. The property is regarded as being committed to export at the time of sale even though it is delivered to an agent of the buyer in this state because the property cannot legally be diverted. 12/22/69.

325.1260 **Foreign Naval Vessel.** A foreign government purchased an anchor chain from the California retailer for use as part of the running gear of a vessel of its navy. The chain was delivered to the vessel at a California port. It was contended that since the vessel flies the Chilean flag, delivery to the vessel constituted delivery to foreign territory, and for this reason the sale was exempt from sales tax as a sale in foreign commerce. The California Supreme Court, however, in *Shell Oil Co.* v. *State Board of Equalization,* 64. A.C. 773, has stated that ''An article delivered to a vessel which flies a foreign flag cannot, for that reason alone, be deemed to have been received at a foreign country or destination and thus to have become an 'export,' ''. The sale of the anchor chain, delivered to the ship in this state, was a taxable retail sale. 8/23/66.

325.1266 **Foreign Seller and Purchaser of Tanker.** A foreign corporation is not engaged in business in California nor anywhere else in the United States. The corporation sells an oil tanker to another foreign corporation also not doing business in California. At the time of the sale, the tanker is situated in a California harbor. The sale of the tanker is not subject to sales nor use tax if, immediately upon the change of the ship's registry, the ship sails for a foreign destination without returning to the United States. A sale under these circumstances is an exempt export sale.

If there is a delay in sailing due to the need for minimal repairs necessary for the tanker to sail, the sale would be subject to sales tax because the repairs would be an interruption of the export journey for a purpose independent of the transportation of the goods. 3/16/76.

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325.1270 **Foreign Trade Zones.**

What Are Foreign Trade Zones?

Foreign Trade Zones are areas in ports of entry wherein goods in foreign commerce are stored within boundaries of the United States or its territories without payment of custom duties, until and unless any of such goods pass from that zone into customs territory of the United States. The purpose of authorizing the creation of foreign trade zones was to encourage and facilitate foreign commerce.

In general, merchandise may be brought into a foreign trade zone without being subject to the customs laws of the United States. Merchandise may generally be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated in a foreign trade zone, or be manufactured in a foreign trade zone, without being subject to U.S. customs laws, and it may then be exported or destroyed without being subject to U.S. customs laws. This exemption does not apply to machinery and equipment that is imported for use (for manufacturing or the like) within a foreign trade zone.

When foreign merchandise moves from a foreign trade zone into customs territory of the United States it is subject to the laws and regulations of the United States affecting imported merchandise.

Where Are the Foreign Trade Zones in California?

There are, to date, four foreign trade zones in California. One in San Francisco, one in San Jose, one in Long Beach, and one in Oakland. At the present time, there are applications pending with the U.S. Government to approve two additional zones in California.

Each zone is divided into ''subzones.'' Effective March 25, 1987, the Long Beach foreign trade zone was expanded to include an area of the city of Santa Ana as a subzone.

How Does Tax Apply in Foreign Trade Zones?

19 USCA 81o(e) reads as follows:

Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local *ad valorem taxation* (emphasis added).

Since the business taxes that the State Board of Equalization administers are not ad valorem taxes, but rather taxes on sales price or volume, depending on the specific business tax, the Board administered business taxes apply in foreign trade zones to the same extent that they apply elsewhere in California.

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The application of the sales and use tax to transactions involving foreign trade zones have been broken down into the following questions and answers:

Question 1.

Does tax apply to sales of tangible personal property made from inside of a foreign trade zone?

a. and delivered to a purchaser in California?

b. and delivered to a purchaser outside California?

Answer:

a. A sale made from a retailer inside a foreign trade zone to a purchaser in California would be subject to tax in the same manner as other sales of tangible personal property delivered to California purchasers.

b. A sale made from inside the foreign trade zone and shipped to a point outside California by means of facilities hired by the retailer or by delivery by the retailer to a carrier, customs broker, or forwarding agent would not be subject to tax. Such a sale would be treated like any other sale in interstate or foreign commerce.

Question 2.

Does sales tax apply to sales of tangible personal property by a California retailer delivered into a foreign trade zone in California?

Answer:

Sales tax would apply to sales of tangible personal property delivered into a foreign trade zone located in California, unless otherwise exempt.

Question 3.

Does use tax apply to tangible personal property:

a. delivered from outside United States to a foreign trade zone in California or

b. to tangible personal property delivered from another state into a foreign trade zone in California

and used inside the foreign trade zone?

Answer:

There is no provision under the California Sales and Use Tax Law which would exempt the use of tangible personal property inside a foreign trade zone from the imposition of use tax. We are aware of no authority under federal law which would prohibit the imposition of the California Use Tax in such an instance. We are, therefore, of the opinion that tax would apply to the use of tangible personal property within a foreign trade zone.

However, it should be noted that, of course, under Revenue and Taxation Code Section 6009.1, use tax would not apply to tangible personal property which is brought into the foreign trade zone for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into other tangible personal property to be transported outside the State and thereafter used solely outside the State. 10/1/82

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325.1280 **Fuel Sales to Foreign Governments.** Sales tax applies to sales of bunker fuel to the Mexican Government for purposes of refueling its vessels, same to be consumed in this state or on the high seas, and which fuel is not unloaded or discharged at any foreign port. 2/10/53.

325.1300 **Fuel Sold to Mexican Fishing Boats.** Sales of fuel oil to Mexican fishing boat operators for refueling their vessels while engaged in fishing operations are not exempt from the sales tax as export cargo, even though the fishermen transport the fuel outside the state and use it in their fishing operations outside U.S. territorial waters. 5/19/66.

325.1320 **Fuel Used in Fishing Operations.** A sale of diesel fuel within the state to a foreign fishing boat operator who uses the fuel in his fishing operations is not exempt from tax as a sale in foreign commerce because the fuel is not furnished to the purchaser for the purpose of carrying it abroad. Even though the foreign purchaser transports the fuel outside the state and uses the fuel in fishing operations outside the United States territorial waters, a sale for the purpose of refueling a fishing vessel is not a sale of export cargo. 7/26/67.

325.1325 **Imports Re-exported from U.S. Customs Bonded Warehouse.** Imports stored in a U.S. Customs bonded warehouse and re-exported are within the exclusion from use tax provided by section 6009.1. Thus, a foreign air carrier that imports inflight supplies which are stored in a U.S. customs warehouse prior to exportation on its aircraft are not subject to the use tax if these supplies are not otherwise used or consumed in this state. 6/15/84.

325.1330 **Interruption in Export Journey.** Once an export journey is begun it is not terminated by a delay in transit unless the delay is for a purpose independent of the transportation of the property. An indefinite delay in transportation for the purpose of collecting other goods for shipment would represent such an independent purpose. An export journey is not terminated if the delay in shipment was for the purpose of consolidating the goods for shipment with other goods already collected and was not for an indefinite period. 5/7/70.

325.1340 **Mexican Nationals Driving Cars to Border.** Cars sold to Mexican nationals and to a United States Consul in Tijuana cannot be considered as exempt export items to foreign consumers because the cars were delivered to the purchasers in California who subsequently drove the cars to Mexico. Despite the evidence showing that the cars crossed the border and were in fact registered in Mexico, the transactions are not sales in foreign commerce because the driving of the cars in California to the Mexican border by the purchasers is considered a local use of the cars making the sale taxable. 10/24/69.

325.1360 **Mexican Resident, Crossing Border to Pick Up Goods.** The fact that merchandise may actually be taken across the border by the purchaser and an export declaration issued does not in itself determine that there shall be no sales tax imposed with respect to the sale.

The Court in the Richfield case (*Richfield Oil Company* v. *State Board of Equalization,* 329 U.S. 69) said ‘‘Delivery was made into the hold of the vessel from vendor’s tanks located at the docks. That delivery marks the

commencement of the movement of the oil abroad.'' It would thus appear that the vendor could not claim exemption merely because ''there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it.'' (*Empressa Siderurgica* v. *County of Merced,* 337 U.S. 154.) It seems that under the facts there is an intent or plan to export but it does not appear that the goods ''have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey.'' (*Coe* v. *Errol,* 116 U.S. 517.) 12/12/50.

325.1371 **Power of Attorney from Purchaser.** An importer/exporter in California was contracted by a Costa Rican company for assistance in purchasing a refrigerated truck for use in Costa Rica. A power of attorney was executed by the importer/exporter and a representative of the Costa Rican company empowered the importer/exporter ''to purchase, transport and or conduct all functions'' on behalf of the Costa Rican company. The importer/exporter purchased the vehicle as an agent for the Costa Rican firm. The importer/exporter was to facilitate and prepare the vehicle for export to Costa Rica. The vehicle left California the day after purchase on a continuous non-stop journey to Costa Rica.

The fact that the importer/exporter was empowered with the power of attorney ''to purchase, transport and or conduct all functions'' on behalf of the purchaser supports a conclusion that the importer/exporter was acting as the Costa Rican firm's representative when it took delivery of the vehicle. California law clearly provides that an attorney in fact is an agent acting under a written grant of authority. *Delos* v. *Farmers Ins. Group Inc.* (1979) 93 Cal.App.3d 642; 155 Cal.Rptr. 843. Thus, pursuant to Regulation 1620(a)(3)(C)1, since the importer/exporter, as an agent for the purchaser, took delivery of the vehicle in California, sales tax applies regardless of the intention that the vehicle would be and actually was transported to a foreign country. 10/3/95.

325.1375 **Property Committed to Export Process.** Property was purchased from a California retailer for export to Mexico. The property was loaded onto trucks provided by the purchaser. The purchaser delivered the property to a forwarding agent who made delivery to destination in Mexico.

Since the purchaser had possession and control from initial delivery until the property was delivered to the forwarding agent, there was not an irrevocable commitment of the property into the process of exportation. Therefore, the sale does not qualify as a sale in foreign commerce (Sales and Use Tax Regulation 1620 (a)(3)(C)(1).) 7/7/93.

325.1377 **Property for Export.** A foreign company purchases property for export from various California vendors but the property is delivered prior to its ultimate removal from this state to a California company for the purpose of being consolidated for shipment with other property similarly purchased by the foreign company for export. Nearly all the items ordered by the foreign company are shipped to the California company for the purpose of being repacked into more economical units to save air freight fees. There is minimum freight charge up to 60 lbs., and the California company consolidates merchandise to exceed the

minimum weight. The property is owned by the foreign company while it is in the possession of the California company. From the California company, the repacked goods are taken by a delivery service to the airport where an air carrier carries the goods by air from California to the foreign destination. Each item is purchased by the foreign company with the intent that the item will be removed from California and each item is in fact ultimately exported to the foreign destination.

The movement of the goods from the various vendors to the California company for consolidation relating to the transportation of the goods to a foreign destination is not independent of the journey in foreign commerce where all parties know and contemplate that the shipment is to go to a foreign destination. The packing and consolidation done by the California company is only ". . . an incidental part of the total export journey" (*Gough Industries* v. *State Board of Equalization* 51 Cal.2d 746, p. 749). Accordingly, the sales are nontaxable as sales for export. 5/26/69.

325.1379 **Property Not Functionally Usable in California.** The sale of appliances in this State to foreign residents is not exempt from tax merely because the appliances were not compatible with electric systems in the United States. The fact that there was reasonable certainty that property sold could not be used in California without modifications is insufficient to exempt the sale as an export under Regulation 1620, subdivision (a)(3)(C). The principal criterion for exemption is that there is an irrevocable commitment to the exportation process at the time of sale. 4/21/92.

325.1385 **Purchaser Listed as Shipper on a Bill of Lading.** A seller has sold tangible personal property for export, but cannot be listed as the shipper on the bill of lading. In this situation, provided the seller follows the following procedures, the property will be considered "irrevocably committed" to the exportation process, within the meaning of Regulation 1620(a)(3)(C)2.

(1) The seller should deliver the property directly to the shipper, freight forwarder or export packing company.

(2) The seller should provide written instructions that the property is to be delivered to the foreign designation and the purchaser is not to have the ability to divert or cancel the shipment. The seller should obtain written confirmation from the shipper, freight forwarder or export packing company that it will comply with these instructions.

(3) The seller should obtain a copy of the bill of lading indicating that the property was actually shipped to the foreign destination. 11/18/92.

325.1390 **Sale of Vessel to Foreign Purchaser.** A vessel designed to carry lumber was sold to a foreign purchaser who has never conducted any business in this state. All of the necessary paperwork and approvals were obtained from the Maritime Administration and the Collector of Customs, including the surrender of the ship's Certificate of Enrollment and License. The seller also filed a Customs Declaration listing the vessel as an export and showing a foreign port as the place and country of ultimate destination. After a foreign crew was placed

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aboard, the vessel was moved to a repair facility in California where it was determined that repairs would be too costly. The vessel was taken to a salvage yard in California.

In *Matson Navigation Co.* v. *SBE,* 136 Cal.App.2d 577, the court held that the sale and delivery of a steam ship of American registry to a nonresident alien buyer never having done business in this state commits the ship irrevocably to foreign trade, in view of 46 U.S. Code 883, which prohibits such a ship from thereafter engaging in domestic trade. The court held that the act of sale itself constitutes exportation. While the vessel did not leave port, this is an incident of foreign rather than domestic commerce. The sale to the foreign purchaser is exempt as an export. Should the vessel be scrapped or sold to a California customer for some other purpose, the transaction should be classed as an import. 4/10/68.

325.1393 **Sale for Resale to Related Entity.** A firm purchases lumber under a resale certificate which is consigned to a related entity located in Mexico. The possession of the lumber by the firm prior to its exportation is not ''possession'' by the Mexican entity within the meaning of Regulation 1620 and would not, in itself, preclude exemption by reason of export. Although the invoice from the supplier shows the Mexican entity as the purchaser, it appears that the goods were resold to its related entity by the California firm. 2/10/93.

325.1396 **Shipping Containers Sold for Export.** A taxpayer sells shipping containers to a Canadian company. The customer takes delivery of the containers in California and then transports them outside California for loading of property for export. The sale of the containers do not qualify for the export exemption because the purchaser took possession of the containers prior to commitment of the containers into the process of exportation. Also, the sale does not qualify for the interstate commerce exemption since the purchaser took possession of the containers in California. Therefore, the sale of the containers is subject to sales tax. 06/27/96.

325.1400 **Storage Before Export.** Property purchased from a California retailer and stored by the purchaser in California at facilities of its related corporation for an indefinite time prior to shipment was not using such storage, in the process of export. The sale of the property was not, accordingly, exempt as a sale in foreign commerce. 9/3/64.

325.1420 **"Stream of Commerce."** The test to be applied to a transaction alleged to be an export sale is whether or not at the time of sale the property involved was sufficiently ''within the stream of foreign commerce'' so as to partake of the Constitutional exemption.

Where several vessels are sold and delivered to a foreign government at a point in California and thereafter towed to another point in California for refitting, the sale has been completed in California and the vessels have not entered ''within the stream of foreign commerce,'' and the sales tax applies. 5/26/53.

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325.1440 **Title, Time of Transfer.** Where vendors, pursuant to contract of sale, deliver property previously prepared by them for export, to a carrier or forwarding agent for shipment to a foreign government, no liability for either sales or use tax is created. This is predicated, of course, on the fact that the vendor retains title to the goods until such delivery and that title does not pass at an earlier time. 1/10/55.

325.1460 **Use Before Export.** Delivery in California of tanks designed for use as containers for transoceanic shipment of products to a purchaser who in turn leased them to governmental agencies and also fills them with products constitutes a taxable sale. Foreign commerce does not commence until after delivery and the aforesaid use by the purchaser in California. 3/31/53.

(6) EXPORT PACKERS AND FORWARDING AGENTS

325.1475 **Consolidation Prior to Export.** Property sold and delivered to the purchaser's representative and held for consolidation prior to export is not an export under Regulation 1620(a)(3)(C)2. To be an export under the Regulation, the property is required to be irrevocably committed to export at the time of sale and it must move in a continuous journey to the foreign destination. In this situation, when the property is being held for consolidation, the export journey to the foreign destination had not begun. Therefore, the property has not entered into the "stream of foreign commerce." 12/30/91.

325.1486 **Delivery to Freight Forwarder.** A foreign airline purchases goods for its own use from California vendors for export to a foreign country. The goods are received at its freight forwarder's premises. The airline (purchaser) will file the foreign country's paperwork to import the goods to the foreign country and it will have the freight forwarder file the shipper's export declaration and coordinate the actual shipping of the freight. The airline's office and the freight forwarder are located on the same premise.

If the property is delivered to the airline's freight forwarder who then delivers the goods to a port outside the continental limits of the United States without the airline taking possession of such property prior to the delivery outside the United States, sales to the airline will qualify for the export exemption. 7/3/95.

325.1500 **Export Packer Also a Purchaser.** Sales of trucks to be exported by the purchaser who is also an export packer and who takes delivery of the trucks in the state for the sole purpose of packing and crating the trucks for shipment overseas are not exempt from tax by virtue of Section 6387. 9/27/68.

325.1510 **Export Packers.** Sales to a foreign purchaser, where delivery is made in California to a separate legal entity set up by the foreign purchaser to act as an export packer, will qualify as exempt within Section 6387, provided the other requirements of that section are satisfied. To be considered an export packer within Section 6387 and Regulation 1620 (a) (3) (C) (1) (b), it is not necessary for a firm to hold itself out to the public as an export packer. It is sufficient if the purchaser and the packer are separate legal entities and the packer is engaged in the business of export packing for the purchaser.

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A vendor qualifies as an export packer within Section 6387 if the vendor regularly packs and exports, not only goods he has sold to the foreign purchaser, but also goods sold to the foreign purchaser by other vendors. 8/24/72.

325.1512 **Export Packers.** Goods sold to a foreign government are delivered to a department of the foreign government who will act as the export packer. The transaction does not qualify for the exemption under Section 6387. In order for the sale to qualify for the exemption provided by Section 6387, the export packer must be a separate legal entity, must be regularly engaged in the business of preparing property for export for hire and must perform these services indiscriminately to the public. 10/24/90.

325.1530 **Forwarding Agent.** For purposes of section 6396, a common carrier qualifies as a ''forwarding agent'' when it consolidates merchandise for reloading aboard another common carrier hired by the purchaser. Accordingly, the delivery of goods to the common carrier acting as a forwarding agent meets the requirements of the exemption if the goods are shipped to an out-of-state point. 1/7/76.

325.1531 **Forwarding Agent.** A ''forwarding agent'' for purposes of the Sales and Use Tax Law is not required to be licensed by the Interstate Commerce Commission or anyone else in order to satisfy the requirements of section 6396. Regulation 1620, which in part interprets section 6396, does not refer to any licensing requirement. Rather, it simply requires that the person or firm be engaged in the business of preparing property for shipment or arranging for its shipment. 7/10/84.

325.1536 **Freight Forwarder.** A shipment of tangible personal property by a California retailer from its Arizona location to a California freight forwarder, for further shipment to a consumer in Hawaii, is an exempt sale in interstate commerce. The sale did not occur in California and the purchaser did not take possession of the property in California. The shipment to the freight forwarder is a continuation of the interstate journey of the property sold. 7/3/90.

325.1537 **Freight Forwarder.** There are no specific licensing requirements for a person to be identified as a ground transportation freight forwarder except for household goods freight forwarders. Therefore, it is a person's or firm's activities which would determine whether they qualify as a freight forwarder under Regulation 1620. A person or firm that is in the business of consolidating shipments into carload lots and performing other services in connection with the shipment of goods for delivery to a port outside the continental limits of the United States without the customer taking possession of such property prior to the delivery outside the United States would be considered as operating as a freight forwarder. 6/14/95.

325.1560 **Mailing Agency as Forwarding Agent.** A mailing agency may be a ''forwarding agent.'' Thus, if the seller acting under his contract with the buyer delivers property to a mailing agency for shipment to an out-of-state point, the sale is an exempt interstate sale. If, however, the seller simply delivers the goods

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sold to a mailing agency which thereafter upon receipt of instructions from the buyer ships some or all of the goods outside the state, the sale is not exempt because the seller was not a party to a contract calling for out-of-state shipment. His obligation was complete upon delivery to the mailing agency where such delivery was unaccompanied by any instructions for out-of-state shipment. Such instructions may, however, be given following delivery to the agency pursuant to subsequent instructions received by the seller from the buyer by way of supplement to the original purchase order which contemplated that shipping instructions would follow. 10/30/64.

(7) SHIPS' STORES AND SUPPLIES—BONDED GOODS

325.1580 **Alcohol in Bond.** Alcoholic beverages delivered out of bond to vessels engaged in foreign trade are not subject to tax, since by Sec. 1309 of Title 19, U.S.C.A., Congress has pre-empted this field of commerce and taxation. 11/12/63.

325.1584 **Alcohol and Cigarettes in Bond.** A taxpayer withdraws alcoholic beverages and cigarettes from bond for sale to a foreign naval vessel. Neither are subject to Federal Excise Taxes or custom duties. The sales of the cigarettes and the alcoholic beverages are not subject to sales and use tax. Federal law preempts this field of commerce from sales taxation by the state. 6/6/77.

325.1600 **Bonded Bunker Fuel.** The sales tax does not apply to sales of bonded bunker fuel made under the following circumstances:

(1) The fuel oil is brought to California from foreign countries and placed in bonded storage immediately upon arrival.

(2) The fuel is delivered directly from bonded storage into vessels.

(3) The fuel is delivered only to vessels engaged in international service and ships engaged in intercoastal trade which are eligible to buy bonded bunkers by reason of their transiting waters of other countries en route to United States ports of discharge. 12/8/59.

325.1620 **Bonded Jet Fuel.** Since the combined effect of Sec. 1309 of Title 19 of the U.S.C.A. and the Regulations issued pursuant to the section would make California sales tax levied upon sales of bonded jet fuel free from customs duty and Internal Revenue taxes conflict with the Federal Government's regulation of foreign and interstate commerce, such sales are exempt under Section 6352 of California Sales and Use Tax Law, but since there are no federal constitutional or statutory prohibitions against California applying its sales tax to sales of non-bonded jet fuel, and as there is no exemption in the California Constitution or the California Revenue and Taxation Code for sales of non-bonded jet fuel, California will continue to collect sales tax on sales of non-bonded jet fuel. 4/11/62.

325.1630 **Bonded Jet Fuel.** For purposes of exemption of bonded jet fuel from California taxes under Section 1309 of Title 19 of the United States Code, an

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aircraft which stops at more than one city in the United States is nevertheless engaged in foreign commerce if its origin or destination is outside the United States. 3/8/77.

325.1640 **Domestic Oil.** Domestically produced oil placed in customs-bonded storage is exempt from sales tax when it is withdrawn and sold for delivery to vessels and aircraft as supplies for use in foreign commerce. 5/15/64.

325.1680 **Ships' Stores.** Sales of merchandise for use as ships' stores on an ocean-going vessel engaged in interstate and foreign commerce are not exempt from tax when the operator of the vessel takes possession of the merchandise in California. 10/27/53.

325.1700 **Ships' Supplies.** Sales of ships' supplies, including gasoline, greases, ice, kerosene, lubricating oils, and medical supplies, to operators of steamships, constitute sales of personal property not exempt under the regulation. 11/2/53.

(8) USE TAX.
See also, Use of Property in State and Use Tax Generally

325.1715 **Artwork Displayed Outside California.** A museum located in California purchased artwork from out-of-state sellers. The artwork was initially shipped to the museum so that the museum Board of Trustees could examine it prior to deciding whether to purchase. After purchase, the artwork was loaned to museums and galleries located outside the state for periods of three or more months prior to being returned to California for exhibition as part of the permanent collection of the museum.

The regulation establishes a presumption that property used outside the state for 90 days or more was not purchased for use in California. The presumption does not apply here because the artwork was in California at the time of its purchase by the museum. It is immaterial that payment was made after the artwork left the state. The museum is liable for use tax. 3/29/73.

(Note: Subsequent statutory change re art purchases for museums.)

325.1722 **Commonwealth of Australia.** The Commonwealth of Australia is not a ''person'' as defined in section 6005. Therefore, the ship's stocks aboard vessels of the Commonwealth of Australia are not subject to use tax. 2/15/74.

325.1724 **Ferry Flights.** Where an aircraft is specifically dispatched from a California airport on an interstate trip that includes a stop at another California airport to pick up passengers, the entire flight, including the flight between the California airports, is an interstate flight. On the other hand, where an aircraft is dispatched from one California airport to another California airport so that it can depart from there on short notice, that flight is not an interstate flight for purposes of Regulation 1620 even if, shortly after its arrival at the second California airport, it takes on passengers and is dispatched to a point outside California. 2/1/01. (2002–1).

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325.1727 **First Functional Use Test.** The first functional use of vehicles, vessels, and aircraft are as follows:

(1) The first functional use of a vehicle, vessel, or aircraft which is designed for commercial carriage, e.g., a bus, a tractor trailer, or a sightseeing boat, will be outside of California if passengers are boarded or cargo is loaded onto the vehicle, vessel, or aircraft outside of California. If such a vehicle, vessel, or aircraft is deadheaded into California, the first functional use will be in California unless the vehicle, vessel, or aircraft is brought into California to fulfill an existing lease or charter or to pick up a specific load of cargo or group of passengers.

(2) As to vehicles, vessels, and aircraft designed for personal use, such as a passenger vehicle as defined in Vehicle Code section 465, a small boat, or a small plane, the first trip or flight into California is a functional use outside of California without regard to who drives or pilots the vehicle, vessel, or aircraft or to whether it is carrying passengers or cargo. Thus, if the first trip is outside of California, the first functional use does not occur in this state.

(3) Vehicles, vessels, and aircraft which are designed for commercial purposes are not functionally used until used for the commercial purposes for which they were designed. For example, a commercial fishing boat is not functionally used until it is used on waters for fishing.

(4) Regardless of what purposes the vehicles, vessels, or aircraft were designed for, the first functional use of such items will be in California if they were not brought into California under their own power and they have not otherwise been functionally used outside of California. 8/10/92.

325.1728 **First Functional Use of Vessel Outside California.** A vessel is first functionally used outside the State of California. It is subsequently transported to California for reassembly and is thereafter transported and used outside of California. The fact that the vessel was brought into California for reassembly for the purpose of subsequently transporting it outside the State for use thereafter outside the State does not support a conclusion that, for purposes of Regulation 1620(b)(3), it is ''as if the vessel never came into California.'' The Board does not ignore the fact that the property was brought into California. Section 6009.1 excludes property's presence in this state from ''use'' when the purpose of entry into California was ''. . . for (reassembly) and (it was) used thereafter ***solely*** outside the State.'' Thus, if the vessel returns to California within six months, the time in California for reassembly is ''use'' within California and the tests set forth in Regulation 1620(b)(3) must be applied to determine the application of tax. 12/2/96.

325.1730 **Making Samples as a Use.** A packaging machine is delivered from Illinois to California where the machine is tested and sample packaging for a new product is made for a field trial. After 5 months the machine is shipped to an out-of-state plant for full production use. The making of sample packages by the packaging machine is a use under section 6201 and subject to use tax,

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notwithstanding the fact that the machine will later be moved out of state and placed in full production use there. 10/15/92.

325.1732 **Material Burned or Buried as Waste.** Use tax does not apply to that portion of the materials burned or buried as waste in the production of a catalyst. The exemption of section 6009.1 applies since the valuable and desired element of the raw material processed will be transported outside this state and will thereafter be used solely outside this state. 11/8/72.

325.1740 **"Piggyback" Equipment.** Drive-in trailers to be used as railroad ''piggyback'' equipment which were purchased and leased out-of-state for use in for-hire transportation of property in interstate commerce are exempt from use tax even though they may enter California in the course of their interstate movements. 9/2/69.

325.1762 **Registration in California.** When a person, resident or nonresident purchases a vehicle, vessel, or aircraft in California and registers that property in California showing a California address, it may be inferred from that registration that the purchaser will use the property in a manner not excluded from the definition thereof by section 6009.1. Use tax would apply unless the purchaser could establish that the property would be used in California only in a manner excluded from the definition of ''use'' by section 6009.1. 12/1/88.

325.1766 **Repair Parts Shipped Out of State.** A company enters into optional maintenance contracts with purchasers of its equipment. The customer sends the part to be repaired to the company. The company sends the part to an out-of-state repairer. The repairer returns the repaired parts to the company and the company sends its technicians to the customer's location to install the parts. In some cases, the part may be sent by the company to the customer for installation by the customer. The out-of-state repairer sells parts to the company as part of the repairs. Since those sales occur outside California, sales tax does not apply. The tax, if applicable, is use tax. However, the storage of the parts in California for future use solely outside California is not subject to use tax. The installation of the parts by the company's technician is a taxable use. If the installation by the company occurs outside the state, tax does not apply. However, if the company ships refurbished parts to out-of-state customers for installation by the customer, tax applies at the time of shipment. This is because at the time of shipment, the company passes title to the part to the customer in California making a complete use of the part in meeting its obligation under the optional warranty. Such use does not come within the section 6009.1 exclusion. 12/6/93.

325.1768 **Space Flight Property.** Taxpayer will sell a spacecraft for delivery in a foreign country with title passing upon delivery in the foreign country. The spacecraft will be integrated with its payload in the foreign country and will then be returned to the taxpayer in California. The taxpayer will inspect the spacecraft for damage, install batteries, and ship it to Vandenberg Air Force Base (VAFB). At VAFB, the spacecraft will be assembled. The launch vehicle then will be attached to an airplane in ''launch ready condition.'' The airplane will be flown

to Florida for "reflecting and final checking out." Then, the airplane will be flown to a point over the Atlantic Ocean for launch.

Section 6380 provides an exemption from the sales and use tax for "qualified property" used in space flight originating at VAFB. In this case, the only flight that will originate from VAFB is not a space flight but, instead, a conventional flight from California to Florida. Thus, the spacecraft does not qualify for the exemption provided under Section 6380. There are insufficient facts to determine whether Section 6009.1 applies to the transaction. 6/7/94.

325.1770 **Spare Parts—Optional Maintenance Contracts.** A taxpayer purchased spare parts ex-tax from out-of-state vendors or from California vendors under a resale certificate. The parts were stored in the taxpayer's California facility pending need. The parts in question were subsequently used in performing repairs on optional maintenance contracts on leased equipment located out of state and were transferred to an out-of-state facility for storage or use there. The taxpayer claimed depreciation deduction on the parts held for use in performing maintenance contracts on its income tax return.

Property purchased in California under a resale certificate or from out-of-state vendors and subsequently shipped to a point outside the state without any use other than that outlined in section 6009.1 is not subject to use tax.

With respect to the taxpayer's income tax depreciation deductions on this property, there is no income tax rule which precludes a taxpayer from claiming depreciation deductions on such property merely because the holding of the property is excluded from "use" for sales and use tax purposes. Thus, the claiming of depreciation deductions does not preclude the taxpayer from obtaining the benefits of section 6009.1.

However, when the taxpayer is aware, at the time of purchase, that it will be a consumer of parts purchased for use on its optional maintenance contracts, it should not issue a resale certificate for this type of property. If it does issue resale certificates, it will be liable for tax under section 6094.5. 2/29/88.

325.1775 **Sweepstakes Promotion.** Company A is a California retailer with retail outlets in California and other states. Its warehouse is located in California. Company A enters into a contract with Company B to provide $300,000 of merchandise for a sweepstakes promotion. Among other things, one of the purposes of the contract is to allow Company C, through its agent Company B, to obtain access to promotional opportunities afforded by Company A's mailing list and retail stores.

The prize fund for the sweepstakes is $300,000 in cost of A's merchandise. B pays A the cost of property shipped each month plus 1.2% carrying cost on the value of the unshipped balance of the unawarded merchandise. Under these circumstances, A is the retailer of the merchandise. Tax applies to its cost price of the merchandise plus the 1.2% carrying cost.

As part of the contract, B pays A a portion of the cost of certain catalog costs. This reimbursement does not reduce the measure of tax on the purchase of the

catalogs by A nor does it represent additional gross receipts from the sale of merchandise. It represents reimbursement for space in the catalog.

As part of the contract, Company C will issue merchandise certificates redeemable by A. These certificates are in lieu of discounts which A normally would provide to its customers. B, in turn, will pay A 85% of the face value of the merchandise certificates. The amount received by A are gross receipts from a sale. B is acting as C's agent in making payment to A. Deliveries of merchandise in California are subject to tax.

Another part of the contract provides that A will pay B a percentage of total sales made from a specific catalog. This payment is in consideration for C's advertising in the catalog. The payment is in the form of A's merchandise certificates. The distribution of the certificates is at B's discretion.

Under these circumstances, A is the consumer of any merchandise which it ships in redeeming the merchandise certificates. Tax applies to all withdrawals of merchandise from the California warehouse in redeeming these certificates even though some merchandise is shipped outside the state. The withdrawal from inventory for this purpose constitutes a "use" in this state. 8/20/89.

325.1780 **Time Period Property Remains in California.** There is no set time period for property to remain in California before section 6009.1 ceases to apply. Although time remaining in California may be evidence of taxable use, one must look to the reason for the property's presence in California and to the actual use of that property in California. If the reason the item remains in California is described by section 6009.1, tax does not apply. If the reason is not described by section 6009.1, tax does apply. 12/1/88.

325.1785 **Tractor Dead-Headed to California.** A carrier purchases tractors from a California truck dealer for use in hauling goods in interstate commerce. The tractors are delivered by the dealer in Las Vegas, Nevada, at the carrier's station in Nevada. Subsequently, a number of the tractors are used to haul loads from Las Vegas to Los Angeles. Others are driven empty from Las Vegas to Los Angeles where they picked up their first pay load. These tractors have been used thereafter continuously in interstate commerce.

When a vehicle is transported empty to pick up a load to be carried in interstate commerce, it is engaged in interstate commerce while traveling to pick up the specific load. Therefore, the trucks driven empty from Las Vegas to Los Angeles are not subject to the use tax since their first functional use occurs outside of California and they are then used continuously in interstate commerce both within and without California. 1/9/64.

325.2200 **Vehicles, Vessels and Aircraft Not Passively Transported.** If the active transportation of planes, vehicles, and vessels out of California is the sole use of the item in California, the transportation is excluded from the definition of "use" as set forth in section 6009.1. Thus, if a person who purchases a vehicle from a nondealer comes into California only for the purpose of picking up the vehicle and driving it directly out of California for use solely thereafter outside California, no use tax would be applicable. On the other hand, if the purchaser is

in California for some independent reason other than taking delivery of the vehicle, the purchaser's driving of the vehicle would be regarded as a taxable use.

In removing vehicles, vessels, and aircraft from California, it is not required by section 6009.1 that the purchaser takes the fastest route out of California. Rather, the question is whether the time it takes to move the property out of California is an appropriate time for direct removal. If the time period appears to be a longer period than necessary to effect direct removal, it may indicate that the purchaser is using the property in California for some additional purposes. For example, the purchaser of a vessel may stop along the way for sport fishing or may dock at California ports on its route outside California. If so, this would support the conclusion that the purchaser is making a taxable use of the vessel. On the other hand, if the purchaser could show that all stops are merely for refueling and restocking, and not for tourist or other purposes, and that there is no interruption in departing from California waters for purposes such as fishing, section 6009.1 would remain applicable and no tax would be due. 12/1/88.

325.2400 **Vessel Delivered Outside of California.** A California retailer of vessels enters into a contract with a California resident for the sale of a customized vessel and delivery at an ''offshore delivery point.'' Provisions of the contract of sale require several partial payment deposits with the final payment due and payable after Buyer's final inspection and acceptance of the vessel at the ''offshore delivery point.'' Seller's right to retain the deposits are contingent upon Buyer's acceptance of the vessel after final inspection. The risk of loss remains with the Seller up to the ''final inspection and delivery'' to Buyer. Possession and control is to remain with Seller prior to delivery of the vessel to Buyer. No title clauses are expressed in the contract. Under Uniform Commercial Code section 2401 and Regulation 1628(b)(3)(D), absent a contractual provision that title passes prior to delivery, title passage occurs at the time seller completes its duties with respect to physical delivery of the property. Under these circumstances, the sale of the vessel occurs outside California and, thus, is not subject to sales tax.

As long as the vessel is delivered outside of California, is first functionally used outside of California, and is functionally used in excess of 90 days outside of California prior to any entry into California, the Buyer's subsequent California use, if any, will not be subject to California's use tax. If the vessel is delivered outside of California and enters California waters within 90 days after purchase, the Buyer will be subject to use tax unless the vessel is used or stored outside of California one-half or more of the time during the six months after the vessel entered California waters. 7/9/97.

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